AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 206.

WILBERFORCE SULLY, TRUSTEE; WILBERFORCE SULLY IN HIS OWN RIGHT, ALFRED R. CARHART, MRS. MARY P. MYTON, AND THE TRAVELERS' INSURANCE COMPANY, PLAINTIFFS IN ERROR,

vs.

THE AMERICAN NATIONAL BANK ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

RECORD FILED APRIL 20, 1899.

(17,373.)

(17,373.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 266.

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1 *Original Bill.*

To the Honorable John P. Smith, chancellor, &c., holding the chancery court at Johnson City, Washington county, Tennessee:

THE AMERICAN NATIONAL BANK OF NASHVILLE, a Corporation under the Laws of Tennessee and of the United States, Engaged in General Banking Business at Nashville, Tennessee, and Shields Bros., Wholesale Merchants at Knoxville, Tennessee, and Scioto Star Fire Brick Works, a Corporation under the Laws of and Engaged in Business in the State of Ohio, on Behalf of Themselves and All Other Creditors of the Carnegie Land Company, Complainants,

vs.

THE CARNEGIE LAND COMPANY, a Corporation Chartered under the Laws of Virginia, but Having a Situs at Johnson City, Tenn., with Its President and Secretary, Residents of Washington County, Tennessee, and Engaged in Business in Tennessee for Profit, Having Complied with the Laws of Tennessee Regulating Foreign Corporations Doing Business in Tennessee, and against John W. Cure and J. T. Wilder; The First National Bank of Johnson City, a Corporation under the Laws of Tennessee and of the United States, Engaged in a General Banking Business in Johnson City, Tennessee, and R. W. Farr, a Citizen of Washington County, Tennessee; Cy H. Lyle and H. H. Carr, Both Citizens of Washington County, Tennessee, and Carnegie Iron Company, a Corporation Organized under the Laws of Virginia, Having a Situs and Owning Real Property at Johnson City, Washington County, Tennessee.

2 Complainants file this as a general creditors' bill against the Carnegie Land Company on behalf of themselves and of all the other creditors of the Carnegie Land Company and respectfully show to the court: They make the above-named First National Bank of Johnson City, Tennessee, Cy H. Lyle, and H. H. Carr defendants to this bill, they each and all being creditors of said Carnegie Land Company, and they pray that they as a class be made defendants, it being impossible for complainants to state the names and residences of all the creditors of said Carnegie Land Company. Said creditors amount to more than fifty in number, and the residence of but very few of them is known to complainants, and it is impracticable to make each and all of them parties hereto.

Complainants Shields Bros. would respectfully represent that the said Carnegie Land Company, as indorser for defendant R. W. Farr, is indebted to them by note executed March 14th, 1893, due at 90 days after date, for $155.11, together with 10% attorneys' fees thereon and protest fees due thereon, $3.04, together with interest from maturity. Said note and protest herewith filed, marked Exhibit "A" hereto, and prayed to be taken as a part hereof, but it

nor any other of the exhibits hereto need to be copied by the master in issuing process.

Complainants American National Bank of Nashville would show unto the court that the said Carnegie Land Company is indebted to it by four several notes executed on March 8th, 1893, each and all due July 5th, 1893, and each for the sum of $600.00, and making in the aggregate $2,400.00, without interest, and each and all of said notes were protested on July 8th, 1893, the total cost of protest on said notes amounting to $16.16. Said Carnegie Company is also indebted to said American national bank on two other
3 notes, executed on March 15th, 1893, and due and payable on July 5th, 1893, each in the sum of $580.00. Said two last-mentioned notes were protested for non-payment on July 8th, 1893, and the cost of protest thereon amount to $8.08 and are due and payable to said complainants.

And said defendant, Carnegie Land Company, is also indebted to said American national bank on other note for $580.00, executed March 15th, 1893, due July 5th, 1893, which was protested for non-payment July 8th, 1893, which protest fees amounted to $4.04 and is due and payable to said complainant.

Said seven last-mentioned notes are herewith filed as Exhibits "B," "C," "D," "E," "F," "G," & "H" and each and all are prayed to be taken as a part of this bill. On each of the said notes held by complainant American National Bank defendant John T. Wilder is security and personally liable.

Each and all of the notes hereinbefore set out are past due and unpaid and are the property of and due and owing to the complainants respectively exhibiting them.

Complainants Scioto Star Fire Brick Works would respectfully show that it is a corporation organized and doing business under the laws of Ohio.

That on March 8th, 1893, the defendant Carnegie Iron Company executed to the last-named complainant its note for $1,000.00, due at 90 days; which said note is herewith filed, marked Exhibit "1" hereto, and prayed to be made a part of this bill; which said note was protested for non-payment on June 9th, 1893, and the cost of said protest amounted to $5.54; which said amount is also due and owing to complainant.

At the time of the execution of said note by said defendant iron company and before the same was delivered to said last-named complainant, the same was indorsed by the defendant Carnegie
4 Land Company, and said complainant charges that both of said last-named defendants are liable to it on said note as principals, and said last-named complainant charges that defendant J. T. Wilder is personally liable to it on said note as security, as will appear from an inspection hereof.

Complainants would further represent unto the court that the said Carnegie Land Company is insolvent; that it owes *bona fide* debts amounting to over $200,000.00, due to various parties, individuals, firms, and corporation, resident and non resident, of the State of Tennessee, but, as before stated, complainants cannot set

out fully the names and residences of such creditors; and complainants would further show that the aggregate indebtedness herein referred to against said defendants is exclusive of an item of $300,000.00 which said defendants claims (as complainants are informed and believe) to be a mortgage lien upon said property and a debt against same, but this debt will hereinafter be referred to.

Complainants would further show unto the court that the defendant Carnegie Land Company was incorporated June 26th, 1889, *as* soon thereafter established an office in Johnson City, in this county, and commenced buying lands in the vicinity and neighborhood of said town, and did buy several hundred acres of land for speculative purposes, and it commenced and laid off streets through said lands, erected a fine hotel and iron furnaces thereon, had maps and charts of same made, lots laid off, called said lands "Carnegie addition to Johnson City," and commenced the process known in modern times of "booming" said Carnegie addition. Various lots were sold off to various parties, and in 1890 said defendant had so far succeeded in booming said lands as that lots in said Carnegie addition were sold and conveyed at enormous prices and at prices many times over and above the value of such lots, and said "boom" for a time was successful, and at said time it looked as though the said Carnegie Land Company would realize large profits.

In the summer of 1890, or perhaps in the fall or winter of said year, the said boom collapsed, and the lands in said Carnegie addition began deteriorating in value, sales thereof ceased, and said lands have since that time continued to fall lower and lower in value, until now very little can be realized therefrom, and they are now of but little value. The history of the Carnegie Land Company has become a part of the history of East Tennessee, and all our people are familiar therewith.

The said iron furnace has never been operated since its erection, and in the depressed state of the country financially is of little value.

The elegant hotel built by said defendant adds but little, if any, value to said land, as the same is located far from the business part of the said town, and the same is surrounded by unused fields and unoccupied lands. The same has been closed as an hotel, and while the same as it now stands is a magnificent ornament, it adds but little to the real value of said defendants' property. The said hotel has heretofore been open for guests, &c., and was kept open, perhaps, about two years; but complainants show that it cost said Carnegie Land Company $100.00 or more each month to keep said hotel open, and the same was kept open by an arrangement entered into between said corporation and one R. W. Farr, under which the said corporation guaranteed the said Farr that the income for running said hotel should not be less than a specified sum, and bound itself to make good to said Farr any deficit in the receipts from said hotel below said specified sum. Under this arrangement the said Carnegie Land Company has each month had to pay to said Farr $100.00 or more. Complainants are informed and

believe that the building of said hotel cost about $70,000.00 or more, and they charge and are informed and believe that the same could not be sold today for more than one-third of this amount in cash or on reasonable time with the purchase-money secured.

The furnace hereinbefore spoken of has been heretofore conveyed to the defendant Carnegie Iron Company, which is also an insolvent corporation, as complainants are informed and believe.

Complainants would further represent unto your honor that the said defendant, Carnegie Land Company, finding itself indebted as aforesaid and being entirely unable to meet or pay its debts, made a general assignment of all its property, real and personal, consisting of the said lands hereinbefore referred to and of notes, accounts, property, effects, and credits set out and enumerated in a schedule annexed to said assignment, marked Ex. "B" thereto, which said assignment was duly registered, together with the schedules of its assets and liabilities attached thereto, in volume 9, Deeds of Trust, pp. 32 to 45, inclusive, in the registry for Washington county. Said assignment was made on the third day of June, 1893, and a duly certified copy of same is filed herewith, marked Exhibit "J," and prayed to be taken as a part hereof.

Your honor will see from an inspection of said exhibit that the liabilities set forth therein, including $300,000.00 of bonds, secured by mortgage, amount to more than half a million dollars, and complainants believe that there are other debts and claims against said company, which are not set out in said schedule, which will greatly increase the sum total of its indebtedness.

Complainants are informed and believe and charge that the note-
enumerated and set our with said assignment are notes which
7 were given for purchase-money for lots purchased by various persons from said defendant land company, and they charge that there are very few instances, if any, where said property, if sold, would bring an amount sufficient to pay and satisfy said notes, which are a lien upon the same, and the purchasers in many instances are insolvent and non-resident of the State. The fact that the property will not bring the amount of the lien debts thereon has been fully demonstrated in various suits wherein the said Carnegie Land Company has sought to enforce its liens against lots in said addition, and in almost every such case said defendant has been forced to bid in said lots, and in many instances at a price far less than their purechase-money debts.

Complainants are advised and so charge that the notes scheduled by said defendant as assets are not worth their face value, and the same may be said of its judgments taken against divers persons, as well as its accounts. Said assets are of far less value than their face. Complainants would further show unto your honor that the 682 lots set out in said schedule and valued at $100,000.00 are not in fact worth one third of said amount, and the other real estate set out and mentioned in said schedule, and estimated to be worth in the neighborhood of $80,000.00, is not in fact at this time worth one-third of that amount, and the values and estimates placed upon said properties all through said schedule are largely in excess of

their real value and are evidently made with reference to the prices which the property bore during the period of the "boom" hereinbefore referred to. The bulk of said land are farming lands, far beyond the town of Johnson City or beyond the limits of said town, and there is nothing at present or in prospect in the conditions surrounding said town calculated to give to said lands any peculiar value.

8 And complainants further charge that the miscellaneous assets set out in said schedule are listed at values far above their real value, and complainants charge that the liabilities of said corporation are far in excess of the value of its assets, and that its assets will be and are insufficient to pay its liabilities in full, and that said corporation is insolvent. They charge that the making of said assignment was a positive act of and admission of its insolvency. They charge that said defendant, Carnegie Land Company, has ceased to do business, has ceased to exercise*d* its corporate functions, has closed its office, and placed all its assets, bag and baggage, in the hands of an assignee, never again to be a going concern.

Your honor will see from an inspection of said assignment that the defendant Carnegie Land Company directs its assets to be collected by its assignee and to be distributed, after paying costs, expenses, &c., of the trust, equally among all its creditors, in disregard of the statutes of Tennessee, which give priority to resident creditors over non-resident creditors.

Complainants Shields Bros. and American National Bank are advised that under the act of assembly of 1887 and amendments thereto, by the act of 1891, chapter 122, the creditors of the said defendant, Carnegie Land Company, resident of the State of Tennessee, are entitled to priority of satisfaction out of the assets of said defendant over non-residents creditors.

Complainants would further show unto your honor that the said Carnegie Land Company named in said deed of assignment as its assignee its former secretary, the defendant John W. Cure; that said Cure has taken possession of the assets of said company and is now holding the same. He has entirely failed to execute said trust or to take necessary steps toward the execution thereof.

9 Complainants are informed and believe that he has not collected anything of any consequence on the said notes, has taken no steps toward taking judgment thereon or enforcing the liens retained in said notes, and if he has sold or disposed of any of the personal property complainants are not advised thereof, no*t* has he taken any steps to dispose of the real assets belonging to said defendant. Complainants are advised that the said Cure, together with said defendant company, *are* holding said trust in *o*beyance or refraining from the execution thereof in the hope that some unknown *something* in the *unknown future* will turn up to their advantage; and it seems to complainants as though this said deed of assignment was made merely for the purpose of holding off creditors from the enforcement of their demands, thus allowing said defendant to await future possibilities.

Complainants call the attention of the court to the first item in

schedule of assets attached to said deed of assignment, which is $300,000.00 of the first-mortgage bonds of said Carnegie Land Company, and show that this is not an asset of any value, being the undisposed-of bonds of the company still in the hands of its treasurer, and, the said company being indebted as hereinbefore indicated, the said bonds could not be negotiated, sold, or hypothecated for any amount and are utterly valueless, and the said defendant by its deed of general assignment has put it beyond its power to negotiate said bonds or to give to them any value; and the second asset set out in the schedule, being bonds of the Carnegie Iron Company to the amount of $100,000.00, are comparatively valueless because of the insolvency of said Carnegie Iron Company; and complainants charge and will show to the court, if necessary, that the said Carnegie Iron Company has made a deed of general assignment, made on
10 the same day, as complainants are advised, with the assignment made by the Carnegie Land Company.

Complainants would here state that on the 19th day of June last the said John W. Cure, its assignee, filed a bill against the Carnegie Land Company in your honor's court, at Johnson City, Tennessee, asking your honor to allow him to reopen the Hotel Carnegie, assuring your honor that the operation of said hotel should not cost the creditors of the Carnegie Land Company above the modest sum of $100.00 per month, and in effect assuring your honor that unless the said hotel was kept open, that Carnegie must forego the pleasure of seeing the street car approach the hotel each day, and this request is made in the face of the fact that the schedule filed along with the assignment shows that the defendant company has, prior to the date of its said assignment, by running said hotel, added to its indebtedness the sum of $1,900.00, and to this bill now pending in your honor's court none of the creditors of said company were made parties, although directly interested and resisting said application.

The premises considered, complainants pray that all the parties named in the caption of this bill be made defendants hereto by the issuance of due and proper process; that they each and all be required to answer this bill fully and truly, but an answer under oath is waived as to each and all of them.

Complainants pray that they be allowed to file this as a general creditors' bill in behalf of themselves and of all the other creditors of the Carnegie Land Company, and that this bill be sustained by your honor as such.

That all the *bona fide* creditors of the Carnegie Land Company be required to prosecute their claims and demands against said company in this court and in this cause, and to that end that they be allowed to file their petitions in term or vacation, exhibit-
11 ing their respective claims and demands, and to prove the same before the master, and they be granted all the benefits of this proceeding to which complainants may be entitled, and that the master be directed by due publication to notify all the creditors of the said Carnegie Land Company to file their claims in this cause, and that all and each of the creditors of the Carnegie Land Com-

pany be enjoined from prosecuting any suits against said company on their claims, except in this cause, and that said creditors be notified of said injunction in said publication of notice; that a receiver be appointed to take into his possession all the property of the said Carnegie Land Company of every sort whatsoever, real, personal, or mixed, and that such receiver be empowered and directed by decree herein to convert all of said property into money at the earliest practicable time, and that he be authorized to bring all suits necessary to collect debts due the defendant company or to assert its rights or claims to any property, and to do all other acts necessary to collect or protect the assets of the said defendant company.

That complainants have decrees herein for the amounts of their said debts due to them respectively, as hereinbefore set out, against said defendant company and the other parties hereto who are principals, securities, or endorsers upon said notes.

That the master be directed to take and state an account and show the amount of the assets of said defendant company.

2. The names of the preferred creditors, if any, and the amount due each and the particular asset on which each has a lien or peculiar equity and who of the creditors of the said defendant company are resident of the State of Tennessee and who of them are non-residents.

3. The names of the general creditors and the amount due each.

12 4. The probable amount of costs and expenses of this suit, including expenses and compensation of the receiver and a reasonable counsel fee for the solicitors of the complainants herein.

5. The *pro rata* of the general creditors out of the funds subject to distribution among them.

Complainants further pray that the property hereinbefore referred to be all sold on a credit of six months and in bar of redemption; and complainants pray that your honor by decree settle and determine all questions of priority or right of preference which may arise among creditors in the distribution of said assets.

And complainants pray for all such other, further, and different relief as they may be entitled to in equity upon the facts hereinbefore stated, and they pray for general relief.

SHIELDS BROS.,
AMERICAN NATIONAL BANK,
SCIOTO STAR FIRE BRICK WORKS,
By DEADRICK & EPPS, *Solicitors.*

REEVES & BAXTER,
DEADRICK & EPPS,
Solicitors for Comp'ts.

STATE OF TENNESSEE, }
Washington County. }

Personally appeared before me, the undersigned authority, A. S. Deadrick and E. F. Baxter, solicitors for all of the complainants in

the foregoing bill, and made oath in due form of law that the facts stated in the foregoing bill are true to the best of their knowledge, information, and belief.

A. S. DEADRICK.
E. J. BAXTER.

13 Sworn to and subscribed before me this November 27th, 1893.

W. F. YOUNG, *C. & M.*

Endorsed: No. 341. Original bill. American National Bank *et als. vs.* Carnegie Land Company *et al.* Filed November 27th, 1893, at 9 o'clock p. m. W. J. Young, C. & M.

14 *Demurrer and Answer of J. W. Cure and Carnegie Land Co.*

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

The defendant J. W. Cure comes, by his solicitor, and demurs to complainants' bill, and as ground therefor set- down the following:

1st. There is no equity on the face of the bill.

2nd. In so far as the bill seeks to reach the equitable assets of the defendant company, complainants are entitled to no relief, because such proceedings can only be maintained by creditors by judgment, with execution returned *nulla bona*, in the absence of allegation of fraudulent conveyance, contrivance, or device resorted to by defendant company to hinder and delay creditors.

3rd. The purposes of the bill are unknown to and at variance with all the precedents of equity jurisprudence and practice, in that the complainants, who are but three of some fifty beneficiaries of a trust which is not itself assailed, ask the court to set aside and annul the deed and actively assume the administration of the assets constituting the corpus of the trust estate, and to distribute the same precisely as provided in the deed, except to divert a part to the payment of complainants' counsel, without aver-ing a single fact affecting the validity of the instrument or suggesting even a possible infirmity therein.

4th. The court will not annul a conveyance in trust for creditors except for want of due execution, fraud, or positive illegality, or because contrary to some rule of public policy, and will not remove a trustee or assignee except for incapacity, misconduct, or insolvency, and these must be specifically averred and proved.

5th. By the recital on page 10 of the bill it is shown that
15 complainants at the time of filing their bill had full knowledge of the fact that the trustee had applied to your honor for aid and direction in the matter of the administration of said trust, and that from thence this said trust was fully administered it was your honor's right and duty to protect from interference and suit in this court both said estate and said trustee, and such fact

rendered the filing of said bill by the complainants such an impropriety as should require its dismissal.

6th. And for other causes to be shown on argument. Wherefore demurrant demands judgment, etc.

Answer.

And, not waiving said grounds of demurrer *by* insisting on same, for answer to said bill said respondent says—

That in so far as he is advised the names, residences, corporate character, partnership, and individual relation of the parties named as complainants and defendants are correctly stated in the bill; but it is denied that the Scioto Star Fire Brick Works as a corporation has any legal status in this State enabling it to sue and enforce the debt claimed to be due it; for respondent shows to the court that the contract out of which said alleged liability arose was entered into and executed between December 1, 1891, and Jan. 30th, 1892, and said complainant, being, as shown, a foreig*h* corporation, was required by *status* to file its charter with the secretary of state and have an abstract thereof registered in the county of Washington, where said transaction took place, which it wholly failed to do. Wherefore it is not permitted to attempt to enforce the payment of said debt, because the same is illegal and void.

Respondent, while admitting that defendant company is liable to complainants, except said Scioto Star Fire Brick Works, to
16 probably the amount stated in the bill, still respondent insists that said complainant-, not being judgment creditors and having expressly accepted the benefits of said trust assignment, which respondent avers they did *so*, have no right to file the bill they have presented in this cause.

Respondent, further answering, says that at the time of the execution of said notes to the complainants The American National Bank there was delivered to it, as collateral security to said notes, six (6) first-mortgage bonds of the defendant iron company, each for $1,000.00, making six thousand dollars, as the land covered by said mortgage is about 22 acres, on which is a practically completed modern iron blast furnace, which costs in its erection and equipment fully $159,000.00, and is worth that sum at this time, and the mortgage bonds issued thereon amount only to the sum of $100,000.00. Said bonds were the property of said land company. The complainant either has said bonds in its possession or has disposed of same. If the latter, then it is chargeable with their par value, while if it still has said bonds it should have brought the same into court with its bill as an assets belonging to said estate; and respondent asks that your honor require said complainant, by proper order herein, to produce said bonds and file the same with the clerk & master of this court, or in default to charge it with the value thereof.

Respondent not only denies, but says it is untrue, that defendant land company is indebted to the amount of $200,000.00, and had complainants taken the trouble to cast up the indebtedness shown

in said schedule instead of guessing at it they would easily have seen that the sum total thereof is but $107,000.00; in addition to which it is liable by its endorsement on the paper of its co-
defendant, the iron company, to the extent of $1,000.00 (if said
17 latter is a liability at all); and respondent says that there is no contingency on which the indebtedness of said land company will exceed, principal and interest, the sum of $125,000.00; and there is no excuse for the positive statement of the bill that the said "*bona fide*" indebtedness would amount to and was $200,000.00. It seems that it would have been but fair for complainants, as they had before them the sworn statement of said indebtedness, which showed that within the knowledge of the company there existed but $107,000.00, to have pointed out to the court and respondent assignee the whereabouts of the other $93,000.00, as such discrepancy would have shown the unfitness of respondent as assignee and justified the demand made in the bill for his removal. The item of $300,000.00 shown in said schedule of assets and liabilities needs no explanation other than what is therein given. It is neither an asset nor liability, but as the basis of issuance of mortgage bonds which the land company purposed negotiating just before the financial crisis began a mortgage was put to record in said county which showed an actual encumbrance on said company's reality to the amount of $300,000 00. It was deemed proper and necessary to show that the liability in fact did not exist by simply stating it in the ordinary mode of book-keeping. It is true that land company was incorporated under the laws of Virginia; that it complied with the laws of Tennessee, and opened shop at Johnson City, and began to purchase lands, lay off lots, grade and macadamize streets, build hotels, iron furnaces, and encourage and promote street railways, water works, electric light and power plants, and other like projects, which as a whole were agreeably accepted by the people; but respondent insists that as said company has by these (according to
complainants' view) ill-advised ventures made itself insolvent
18 while it created, to be left for others, a variety of expensive, permanent, and, in some respects, beneficial improvements, it ought to have been exempted from the opprobrious charge of having been a mere speculator and boomer. As but one of the complainants lives in east Tennessee, respondent protests that they shall not call the good and eminently just and considerate people of this section "our people," when maligning and doing their utmost to bankrupt and destroy an enterprise which has been so fruitful of good to the country at large.

It will be sufficient in answer to all the vaporings and fictions of the bill about booms, speculations, collapses, &c., to point out a few facts which are a part of both the past and current history of east Tennessee with which our people are all familiar—that is to say, at the time defendant Wilder, who was the promoter of the land company, began operating at Johnson City, in about 1886, the total assessed value of all the real and personal property in the 9th district, in which Johnson City is situated, was $314,725.00. In 1890, when complainants say the "boom collapsed," it was $1,618,060.00,

and in 1892, two years after said collapse, and while the worst financial depression the country ever experienced was in its most acute stage, it was $1,958,875.00, in the neighborhood of the one-half of the entire taxable property of the county, the latter being $4,307,475.00. Respondent has been unable to obtain the tax aggregate for the current year, but he is advised that the amount shown therein will not vary materially from those of 1892.

Comment upon the discrepancies between these public records and the facts as they exist in other equally reliable forms and the statements of complainants' bill as to the value of said land company's property would imply a lack of confidence in the intelligence of the court; respondent therefore refrains from so doing.

19

It is true that the land company erected and equipped a fine hotel upon its property. It did this on the reasonable expectation that the public demand for such convenience would sooner or later justify the expenditure, and many men who have succeeded in business in country still think so; and it is a matter of no small consequence that complainants think otherwise, as their view, whether the correct one or not, has assumed a most mischievous form, in that they decry and disparage everything said company has, except its liabilities, which, for some reason not obvious, perhaps unconsciously even to themselves, they correspondingly increased.

It is true that said hotel has been closed, but for what reasons, and what representations were made to your honor by respondent, and your honor's action thereon, *and* better appear—in fact only appear—from the bill now pending in this court, and to which respondent refers and will refer on the hearing of any motion or hearing on the merits of this cause, the style of said cause being John W. Cure, trustee, &c., *vs.* Carnegie Land Company.

It is true that on the 3rd day of June, 1893, said land company assigned to respondent all and singular its assets, to be held and used by him in the payment of said company's debts *pari passu*. This act was one that said corporation was fully competent to do, and in the doing it only exercised a lawful right and pursued a course which sound business judgment will always command and approve.

To execute such instrument was not in law or fact an act of insolvency, and can never be held so under the statutes of Tennessee. It does not under any law work a dissolution of the corporation or a forfeiture of its franchises; and any insustance at this time, in view of what the financial condition of the country has been for the past two years, and still is to some extent, that said assignment was an act of insolvency to which penalties and general confiscation —, such as usually attend such state of things, would be unjust and monstrous and repugnant to every sense of right and fairness.

20

Respondent has shown hereinbefore that complainant's estimates of the value of said assets is worthless, so also their statements of said liabilities; but respondent here shows that said property, both

real and personal, was estimated at what was at the time considered its cash value by a party who was to a considerable degree familiar therewith and was otherwise competent to judge of its value and who was wholly disinterested, and none of said values were fixed by any officer of the company, unless it might have been a few of the articles of the personal property, and said property is today intrinsically worth the values fixed on it. At the values fixed, said property is worth $493,631.00.

It is true that many of said notes reported in said schedule were given for the purchase-money on lots sold to the parties executing them; but it is denied that most, or any large number, of the parties are insolvent, &c. The fact is, if said notes had been put in suit at once by respondent on being appointed assignee, great distress and loss would have been occasioned the makers, such as even Shylock would have relented at, but, over and above all that, much of said land would have been thrown back on the company's hands and respondent would have had to pay unnecessary bills of costs, attorneys' fees, &c.

Whereas, if a little time were given, said notes would in great part be paid and loss avoided. The course pursued by respondent is that which this honorable court has adopted in decreeing sales of real estate—that is, not to hinder and delay creditors in
21 realizing their just demands, but preventing them from using the distressed condition of the country unfairly to the unnecessary hurt of the debtor and to the general corruption and debasement of the public morals.

Respondent denies that said land company has ceased to do business in any sense of abandonment of its franchises. It is not "doing business" with the assets assigned to respondent, of course, but it is doing business; *not* is it true in fact or semblance of fact that it has ceases to exercise corporate functions or has closed its office. None of these facts charged in the bill and above denied can aid the charge of insolvency any more than the erroneous legal conclusion sought to be predicated of the act of assignment and which is bracketed with said statements of facts.

Respondent is advised and so charges that — whether the acts of 1887 and 1891 cited by complainants give them a preference or not, respondent neither affirming or denying the proposition, but he does charge that the land company would have been guilty of an impropriety had it attempted to incorporate two apparently conflicting statutes into its deed, the one forbidding, the other making preferences. So to avoid provoking controversy over the point said company simply placed all its assets in the hands of respondent to be by him administered according to law, and respondent thereafter by a proper proceeding invoked the aid of this honorable court in discharging his onerous duties.

The following sentence in said bill referring to respondent as assignee or trustee, viz., "He has failed entirely to execute said trust or to take the necessary steps towards the execution thereof," is untrue. It is made in the face of facts shown by the public records.

The said deed was made June 3rd, 1893. On June 5th he
22 executed the bond required by statute and on June 7th he filed same, together with the oath prescribed by law, with the clerk of the county court, at Washington county, and on October 30th, 1893, he filed with said clerk, under oath, a full and complete inventory of said assets. All of said documents are now in said clerk's office. Meantime, as soon as respondent had qualified, he entered upon the administration of said trust, and from thence till now has given it his entire time and attention. It is true — has not pursued the headlong policy which complainants indicate he should have done. Respondent challenges complainants to point out a single act or fact done or omitted which fairness to the creditors and all concerned and the fiduciary obligations he was under and good business sense will not fully approve.

And respondent, further representing the interests of all concerned, except complainants who have placed themselves in antagonism to said trust and must abide their election, earnestly protest- that said property shall not be taken out of said trust, because no shadow of ground or authority exists therefor, none has been charged or pretended, and your honor will not allow your honor's court of equity to be converted into a mart of merchandise where honest and hard-earned accumulations are to be yielded up to the greed of gain for the mere asking.

Respondent does not deny or even question the right of the creditor to have his just and lawful dues, but he does deny his right to dictate terms to — court of conscience, which set to administer justice in that spirit of truth and religion which expresses itself in the almost divine maxim *ex æquo et bono*, in furtherance of which and to make it effectual the court will give the weight and consideration to the prevailing distress and will not permit advantage to be taken by one or many to the greater injury of any, though by so
23 doing some are denied the ready and immediate enforcement of strict technical right.

Respondent is ready, as he has always been, to execute said trust, and, as he has done in his said bill, here invokes your honor's direction therein, and will at all times give his time and energies to said business and act therein without partiality, bias, or prejudice.

And, having fully answered, respondent prays that complainants be denied all relief as to said assignment, and that to that extent the bill be dismissed; but, as said bank and said brick works are before the court, respondent asks that your honor determine herein the question as to said collateral bonds as to said bank and the liability of said company on the claim of said brick works, and if it is deemed necessary for these purposes that the answer be treated as a cross-bill and the causes be consolidated with the bill of respondent now pending, which has been referred to; and, having fully answered, respondent prays, &c.

JOHN W. CURE.

(Signed)

KIRKPATRICK & BOWMAN, *Solicitors.*

John W. Cure, resp't in the foregoing answer, makes oath that the facts set forth by him therein of his own knowledge are true, and those stated on information and belief he believes to be true.

JOHN W. CURE.

Sworn to and subscribed before me on the 8th December, 1893.

C. W. HODGE, *D. C. & M.*

The Carnegie Land Company comes, by solicitors, and joins in and adopts the defences of the foregoing demurrer and answer as its own.

THE CARNEGIE LAND COMPANY,
By KIRKPATRICK & BOWMAN, *Att'ys.*

KIRKPATRICK & BOWMAN, *Solicitors.*

24 Endorsed: No. 341. Demurrer and answer. American National Bank *et al. vs.* Carnegie Land Company *et al.* Filed Dec. 8th, 1893. C. W. Hodge, D. C. & M.

25 *Original Bill.*

To the Honorable John P. Smith, chancellor, etc., holding chancery court at Johnson City, Washington county, Tenn.:

WILBERFORCE SULLY and A. B. CARHART, Residents of the State of New York, Complainants,

vs.

THE CARNEGIE LAND COMPANY, a Corporation Created under the Laws of Virginia, but Whose Property and Place of Business is at Johnson City, Tennessee, & Travelers' Insurance Co., Incorporated under Laws of Connecticut, and with Prin. Office at Hartford, Conn., and Connecticut Trust & Safe Deposit Co., Inc. of Conn., Defendants.

Complainants will respectfully show to the court:

I.

That the defendant The Carnegie Land Company was at all times hereafter mentioned and now is a corporation created, organized, and existing by and under the laws of the State of Virginia.

II.

That on the 2 day of January, A. D. 1893, defendant The Carnegie Land Company, in pursuance of the power and authority by it in that behalf possessed and in pursuance of due corporate action having been had for its lawful corporate purposes, resolved and determined to issue its corporate bonds to be known as the first-mortgage bonds in denominations of $1,000.00 each, amounting in the aggregate to $300,000.00, such bonds to be numbered from one consecutively upwards, and to bear interest at the rate of six per cent. per annum from January 1st,

1893, payable semi-annually on the first day of January and July in each year *of* the office of said defendant
26 company, in the city of New York, on the presentation and surrender of interest coupons as they severally became due, and to secure the same by mortgage on all of its property of every description, including all of its rights, property, franchises, lands, buildings, and premises then held or which might thereafter be acquired, with the exceptions only, as hereinafter stated, with respect to one piece of property in which the equity only was conveyed and some other realty. Said defendant, The Carnegie Land Company, therefore duly made and executed such bonds to the amount of $300,000.00 of principal, par value, and by each of said bonds, for value received, promised to pay to Wilberforce Sully, of New York, or bearer, on the first day of January, A. D. *1918*, at the office of the company, in the city of New York, free from all United States taxes, in the gold coin of the United States of America, with interest from January 1st, 1893, at the rate of six per cent. per annum, payable semi-annually in the like gold coin, at the office of the company, in the city of New York, on the first day of January and July in each year, on the presentation and surrender of the annexed coupons as they severally become due, and in the case of default in the payment of any installment of said interest according to the tenor and effect of said bonds and of the coupons representing said installments, and such default continue for a period of ninety days after demand of payment, the principal of said bonds should become due and payable in the manner and with the effect specified and provided in the mortgage or deed of trust hereinafter mentioned, each of said bond- reciting that it was one of a series of bonds of like tenor, amount, and date, numbered consecutively from one to 300, inclusive; all of which, with interest thereon, it was recited, were equally secured as a first lien by a mortgage or deed of trust of equal date therewith, duly recorded, conveying therewith to Wilberforce Sully, in
27 trust, all and singular the corporate property and franchises of the said company, whether the same was then held by said company or thereafter acquired. Said bonds further recited that such funds that might arise from a sale of such mortgaged property made according to the provisions of said mortgage after one year from the date of said bonds were to be used for retiring the bonds secured thereby, and with such funds any or all of the series might be paid through tenders, and if none were offered at less than a premium of five per cent. and accrued interest, then those to be retired should be drawn by lot at that price, and thirty days' notice of the call for tenders of those chosen by lot should be given in a newspaper published in the city of New York and Johnson City, Tennessee, and further providing that the bonds, at the holder's option, might be registered on the books of the company at its office, in the city of New York, and be made payable only to the registered owner to be named thereon, but that such registration should not effect the negotiation of the coupons by delivery merely, and after such registration the bonds might be again made payable

to bearer by proper registration to be noted thereon at the transfer office of the company, the bonds not to become obligatory until duly authenticated by the certificate of the trustee endorsed thereon.

III.

Complainants would further show your honor that none of said bonds were negotiated except eighty-five of the same, numbered from one to eighty-five, inclusive, representing a par value of $1,000.00 each, aggregating $85,000.00, with the interest coupons attached, as provided; that the remainder of said bonds, except the $85,000.00, were cancelled, and constitute no binding obligation upon the part of the Carnegie Land Company and upon its property set out
28 and described in said mortgage; that the said eighty-five bonds of the par value of $1,000.00 were negotiated for value received by defendant to complainant A. B. Carhart and are now *owed* and controlled by him; and further complainants states that said bonds to the amount of $85,000.00 of principal, par value, were duly certified by complainant Wilberforce Sully, as trustee, under the mortgage or deed of trust hereinafter mentioned, and were delivered by him as trustee in accordance with the terms of said mortgage; and complainants further state that all of said bonds, numbered from one to eighty-five, inclusive, and of the par value of $85,000.00, with interest coupons thereon, which are attached to said bonds, are valid obligations of said defendant, The Carnegie Land Company. Said bonds and coupons will be filed upon the hearing.

IV.

Complainant- would next show your honor that in order to secure the payment of the principal and interest of said bonds hereinafter described according to the terms thereof without preference or priority by reason of the time of issue and equally and ratably said defendant, The Carnegie Land Company, in the due exercise of the power and authority by it in that behalf possessed and pursuant to due corporate action on the company to that end, did, on the 2nd day of January, 1893, execute and deliver to complainant Wilberforce Sully and did seal with its corporate seal its certain mortgage or deed of trust of date as before stated, and thereby granted, bargained, sold, transferred, and conveyed unto complainant Wilberforce Sully, and his successor or successors in trust thereby created, and his assigns forever, the property, rights, and franchises, which are now more particularly described as follows:

Situated in the State of Tennessee, county of Washington, 9th civil district, and further described as follows:

29 Beginning at a set stone on side of knob, a corner to what was formerly known as the *fraklin* hoss land (home place), N. 55 W. 1,851 feet to a set stone, S. 60.44′ W. 186.3 feet to a set stone, N. 22.20′ W. 323.2 feet to a set stone, S. 60.40′ W. 978 feet to a set stone, N. 220 E. 494 feet to a set stone, N. 89.48′ W. 64.2 feet to a stake, S. 65.26′ W. 174 feet to a stake, N. 55.8′ W. 656 feet to a set stone, N. 75.8′ W. 270 feet to a stake, N. 44.27′ W. 248 feet to a

set stone, N. 65.48′ W. 115 feet to a set stone, N. 44.34′ W. 329 feet to a set stone, N. 33.23′ E. 574 feet to a set stone, N. 54.18′ W. 566 feet to a set stone, N. 52.34′ E. 430 feet to a stake, N. 38.27′ W. 1,600 feet to a set stone, N. 53.4′ E. 300 feet to a set stone, S. 35.20′ E. 1,594 feet to a stake, N. 52.34′ E. 232 feet to a stake, N. 33.8′ W. 1,810.01 feet to a set stone, N. 68.45′ E. 917 feet to a set stone, N. 69.24′ E. 3,543 feet to a large black oak, N. 12.29′ W. 111 feet to a cedar, N. 66.28′ E. 1,892 feet to a set stone, S. 23.41′ E. 156 feet to a set stone, N. 54.4′ E. 643 feet to a set stone, S. 28.31′ E. 262 feet to a set stone, S. 56.53′ W. 191 feet to a black oak, S. 27.50′ W. 718 feet to a post oak, S. 70.10′ W. 1,090 feet to a set stone, S. 52.23′ W. 725 feet to a hickory, S. 34 28′ E. 4,369 feet to a set stone in the forks of Meadow branch and Brush creek, nesr the ford; thence N. 47.11′ E. 366 feet to a sugar-tree stump, S. 38 E. 194 feet to a stake, S. 42.37′ E. 66 feet to a set stone, S. 22.5′ W. 585 feet to a set stone, S. 52 34′ W. 302 feet to a stake, S. 42.6′ E. 248 feet to a set stone, N. 44.2′ E. 550 feet to a set stone and white oak, S. 26.48′ E. 477 feet to a set stone and pine, S. 4.12′ W. 796 feet to a stake, S. 89.55′ W. 314.5 feet to a set stone, N. 42 14′ W. 403 feet to a stake, N. 86.5′ W. 204 feet to a set stone, S. 3.15′ W. 385 feet to a set stone, N. 26.40′ W. 168 feet to a set stone, N. 87.30′ W. 283 feet to a set stone, N. 49.58′ W. 627.5 feet to a set stone, S. 56.30′ W. 93.8 feet to a chestnut oak, S. 47 W. 1,484 feet to a set stone, S. 8.22′ W. 279 feet to a chestnut oak, S. 57.4′ W. 336.5 feet to a set stone, N. 89.12′ W. 450 feet to a set stone, N. 56.38′ E. 427 feet to the beginning; also the following tract, bounded as follows: Beginning at a stake on the east side of Brush creek, corner to lot #3, N. 36.9′ W. 3,450 feet to a set stone on the old Stevens line, N. 56.25′ E. 75 feet to a set stone, corner to lot #5, S. 36.48′ E. 3,447 feet to a stake on east side of Brush creek, S. 54.2′ W. 113.1 feet to the beginning; also the following tract, bounded as follows: Beginning at a stake about 65 feet W. of Brush creek, N. 24.36′ W. 248 feet to a cedar stump, N. 50 E. 429 feet to a stake in line lot #1, formerly owned by John Saylor, S. 40 E. 210 feet to a stake near Brush creek, S. 46.43′ W. 496 feet to the beginning.

Also the following tract, bounded as follows: Beginning at a stone on the west side of the road from Johnson City to Carter depot and corner to the land formerly owned by T. J. Salts, N. 43.37′ W. 393 feet to a stake on the W. side of Brush creek in the line of lot #D, formerly owned by John Saylor; N. 40 W. 210 feet to a stake, corner to lot #8, formerly owned by Joshua Boring; N. 41 39′ W. 3,024.2 feet to a hickory; N. 52.17′ E. 47.4 feet to a dogwood, corner to lot #2; N. 71.34′ E. 38 feet to a stake, corner to lot #3, formerly owned by Eliza Range; S. 41.54′ E. 3,608.5 feet to a stake between Carter Depot road and the E. T., V. & G. R. R.; S. 31 57′ W. 273 feet to a set stone, S. 36.25′ W. 151 feet to the beginning.

Also the following tract, bounded as follows: Beginning at a cedar on the east side of Carter Depot road, at the foot of a hill, thence up the hill S. 54.36′ E. 538.6 feet to a pine, S. 12.45′ W. 367.5 feet to a chestnut oak, N. 66.57′ E. 989 feet to a hickory, N. 54.35′ W.

55 feet to a walnut, N. 19.54′ W. 506 feet to a hickory, N. 65.36′
31 W. 568 feet to a dogwood, S. 31.55′ W. 340 feet to a stake, N. 45.40′ W. 139 feet to a stake, S. 31.57′ W. 273 feet to a set stone, S. 36.25′ W. 151 feet to a set stone, S. 32.52 E. 98 feet to the beginning.

Also the following tract, bounded as follows: Beginning at a stake, corner to lot # 3, thence N. 42.14′ W. 3,777.3 feet to a set stone and double cedars; thence N. 31.7′ E. 40 feet to a post oak and red oak, corner to lot # 5; thence E S. 42.32′ E. 3,760 feet to a stake; thence S. 64 W. 56.7 feet to the beginning; also the following tract, bounded as follows: Beginning at a set stone in the line of the Millard farm, N. 43.28′ E. 275.6 feet to a set stone; thence N. 36.9′ W. 154 feet to a stake; thence S. 43.28′ W. 275.6 feet to a set stone in the Millard line; thence S. 34.28′ E. 154 feet to the beginning, known as the one-acre tract purchased by J. T. Wilder, agent of Millard.

Also that tract of land conveyed by Thos. L. Rosser and wife by B. W. Rosser to the Carnegie Land Company, by deed registered — Book 57, p. 559, in the registry at Jonesboro, to which reference is hereto made, being the tract adjoining J. R. Lady and others, containing 225 acres, more or less.

Also all the rights, title, claim, and interest of the Carnegie Land Company in the following tract of land, situated in the 9th civil district of Washington county, Tennessee, and in the town of Johnson City, bounded as follows: Beginning at a stake on what was formerly Millard's, then N. 37.45′ W. 200 poles to a hickory tree in Stevens' line, N. 54. E. 25 poles to a stake and post-oak pointers, S. 38. E. 210 poles to a stake near a barn, S. 52 W. 10⅕ poles to a stake, N. 43 W. 9 poles to a stake in graveyard, S. 47 W. 14 poles to the place of beginning, containing 33¼ acres, more or less, but
32 from the above boundary there is expected about $3\frac{9}{14}$ acres sold on the 19th day of November, 1888, to Ellen McCarthey, laying between Myrtle and Watauga avenues, protracted from the town plot of Johnson City, Tenn. Second, the said E. C. Manning and R. S. Boyd sells, transfer, and conveys a three-fourths interest to the Carnegie Land Company in the following tracts of land, situated in Washington county, Tennessee, and what is known as the Carnegie addition to the town of Johnson City, upon the terms and conditions hereinafter named; said land is described as follows:

Lot # 1, beginning at a stake near the lane at what was H. Range's corner, thence with Range's line N. 37½ W. 210 poles to a stake and post oak on what was Stevens' line, N. 54 E. with Stevens' line $4\frac{14}{25}$ poles to a stake, S. 38 E. 210 poles to a stake in what was Joshua Boring's line, S. 52 W. 8 poles to the beginning, containing 7½ acres, more or less. Lot # 2, beginning on a stake on what was Joshua Boring's line, *coner* to Mary Saylor, with her line N. 39 W. 220 poles to a stake on Stevens' line; thence with Stevens' line N. 54 E. $4\frac{14}{25}$ poles to a stake, corner to Harry Johnson's share; thence with said line S. 39¼ E. 220 poles, crossing Brush creek, to a stake on what was Joshua Boring's line; thence with said line crossing the creek south 54 W. 7½ poles to the place of beginning,

containing 7½ acres, more or less. Lot #3, beginning on a stake formerly corner to Sarah Kinnick, thence N. 39 W. 220 poles to a stake in what was Stevens' line, with Stevens' line N. 54 E. $4\frac{1}{2}\frac{5}{5}$ poles to a stake; thence S. 38¾ E. 220 poles to a stake, S. 54 W. 7½ poles to the beginning, containing 7½ acres, more or less. These lots are parts of Vincent Boring's farm, and are the same laid *out* in the division of said farm among the heirs of Vincent Boring and designated lots number one, two, and three.

Also the tracts of land lying in the 9th civil district of Washington county, Tennessee, conveyed to the Carnegie Land Com-
33 pany by R. S. Boyd and Joseph Philips, viz., lot # 5, as shown by survey of partition of the Vincent Boring farm, bounded as follows:

Beginning on a stake, corner to lot No. 4, near east bank of Brush creek, crossing the same N. 39 W. 210 pole*s* to a stake and red-oak pointers, corner to lot No. 4; thence N. 54 E. $4\frac{1}{2}\frac{4}{5}$ poles to a stake; thence S. 39½ E. 195 poles to a stake in John Saylor's line; thence with his line S. 50 W. $5\frac{7}{2}\frac{7}{5}$ poles to a cedar stump, Saylor's corner; thence with his line S. 40 E. 18 poles to a hickory stump, corner to J. Boring; thence with his line S. 52 W. *to* poles to a stake, corner to lot No. 4, containing 7¾ acres.

Also No. 8, beginning on a stake in John Saylor's line and corner to lot No. 7, running N. 40 W. 195 poles to a cedar and hickory in Stevens' line; thence with the said line N. 54 E. $4\frac{1}{2}\frac{4}{5}$ poles to an oak; thence S. 40 E. 195 poles to a stake, Saylor's corner; thence with his line S. 50 W. 8 poles to a stake in same, corner to lot No. 7, containing 7¼ acres.

Lot No. 1, in the survey of partition of the Littel and Boring farm, bounded as follows: Beginning on a stake, Saylor's corner, near a creek, S. 40 E. 55 poles, crossing railroad, to an oak stump in Barnes' line, N. 46 E. 9⅕ poles to a stake near a large cedar, corner to knob lot; thence N. 40 W. 55 poles to a stake on the west bank of creek; thence S. 42 W. 9 poles to the beginning, containing 3⅛ acres; also lot No. 3, beginning on a line, corner to lot No. 2 and in the line of knob lot, N. 40 W. 240 poles to a post oak, corner to lot No. 2 and on Stevens' line; thence N. 72 E. $2\frac{9}{2}\frac{5}{5}$ poles to a double cedar; thence S. 40 east 240 poles to a stake in line of knob lot; thence with said line S. 46 W. $3\frac{1}{2}\frac{1}{5}$ poles to a stake, corner to lot No. 2, the beginning, containing 4¼ acres.

34 Also lot No. 5, in said survey, beginning on a stake in line of knob lot, corner to No. 4, N. 40 W. 240 poles to two post oaks, corner to lot No. 4; thence N. 50 E. $2\frac{9}{2}\frac{5}{5}$ poles to a white oak; thence S. 40 E. 240 poles to a cedar in line of knob lot; thence with said line S. 46 W. $3\frac{1}{2}\frac{1}{5}$ poles to the beginning, containing 4¼ acres.

Also No. 6, in said survey, beginning on a stake and cedar, corner to lot No. 5 and in the line of knob lot, N. 40 W. 240 poles to a cedar and white oak, corner to lot No. 5; thence N. 50 E. $2\frac{9}{2}\frac{5}{5}$ poles to a post oak; thence S. 40 E. 240 poles to a stake in line of knob lot; thence with the same S. 46 W. $3\frac{1}{2}\frac{1}{5}$ poles to the beginning, containing 4¼ acres, and in all containing 30⅝ acres.

Also that realty conveyed to the Carnegie Land Company by

S. W. Wilson, the same lying and being in the town of Johnson City, Tennessee, district No. 9, it being a one-fourth undivided interest in the lots known as Nos. 1, 2, and 3, as designated by the commissioner appointed by the court to divide the land of Vincent Boring among his heirs, lot No. 1 being bounded as follows: Beginning on a stake near the barne of H. Range's corner, with his line N. 37½ west 210 poles to a stake and post oak on Stevens' line, H. Range's corner; thence N. Stevens' N. 54 E. 4½¼ poles to a stake; thence S. 38 E. 210 poles to a stake in J. Boring's lot; thence S. 42 W. 8 poles to the beginning, containing 7½ acres, more or less; lot No. 2 being bounded as follows: Beginning on a stake, corner to lot No. 1, in Stevens' line, N. 54 E. 4½¼ poles to a stake and sourwood; thence S. 39 E. 210 poles to a stake in J. Boring's line; thence with his line S. 52 W. 8 poles to the beginning, containing 7½ acres, more or less; lot No. 3 being bounded as follows: Beginning on a stake in J. Boring's line and corner to lot No. 2, running N. 39
35 W. 210 poles to a sourwood, corner to lot No. 2, in Stevens' line; thence N. 54 E. 4½¼ poles to a red oak; thence S. 39½ E. 210 poles to a stake on east side of creek; thence S. 52 W., crossing the creek, 8 poles to the beginning, containing 7½ acres, more or less, and in all containing 22½ acres, more or less.

Also all the title and interest of the Carnegie Land Company in and to the following tract of land, situated in the 9th civil district of Washington county, Tennessee, adjoining the lands of the late Jno. Stevens, the farm formerly owned by Isaac Williams and others, and bounded as follows: Beginning at a cedar at the N. W. corner of the farm formerly owned by J. R. Lady and wife and running N. 10.9′ W. 547 feet to a double persimmon; thence N. 54.7′ E. 368 feet to a set stone; thence N. 13.39′ W. 216 feet to a stake; thence N. 57.24 E. 322½ feet to a set stone; thence N. 8.57′ W. 186 feet to a black gum; thence S. 70.28′ E. 183 feet to a set stone; thence N. 20.25′ E. 484½ feet to a set stone; thence S. 73.13′ E. 350 feet to a set stone; thence S. 25.40′ E. 960 feet to a set stone; thence N. 68.33′ E. 1,012 feet to a set stone; thence S. 25.54′ E. 348 feet to a set stone; thence S. 54.4′ W. 543 feet to a set stone; thence N. 23.41′ W. 155 feet to a set stone; thence S. 66.28′ W. 1,892 feet to the beginning.

Also lots Nos. one, two, three, four, five, six, seven, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-three, in block No. 6 of the Carnegie Land Company addition to Johnson City, 9th civil district of Washington county, Tennessee, as per recorded plat thereof in the registry at Jonesboro, it being the realty on which stands the Hotel Carnegie, subject, however, to a trust deed thereon, executed by the Carnegie Land Company to the Connecticut Trust & Safe Deposit Company of Hartford, Conn., trustee, of date Nov. 23rd, 1891, to secure the payment of the sum of
36 $30,000.00 to defendant The Travelers' Insurance Company of Hartford, Conn.

But there was expressly reserved and exempted from the operations of said instrument the following realty, all situated in the 9th civil district of Washington county, Tennessee: All lots or parcels

of land conveyed by the Carnegie Land Company prior to the date of this trust deed or mortgage by deed executed and delivered; also all rights of way shown by the map of the Carnegie Land Company's addition and by contracts or deed heretofore executed to belong to the East Tennessee, Virginia and Georgia and the Charleston, Cincinnati and Chicago R. R. Companies; also the tract of land beginning at the south corner on North Main street and First avenue and running with the east side of said avenue to Fair street; thence with Fair street to the right of way of the Charleston, Cincinnati and Chicago railroad; thence — its said right of way to the most southerly point of the Union passenger depot ground, as shown by the deed of the Carnegie Land Company therefor; thence on a line parallel with the east side of North Main street to Short avenue; thence with said avenue to the west of North Main street; thence with North Main street southwesterly to the beginning; also the following tract of land, being that tract designated on the present map of the Carnegie Land Company's addition as the C., C. & C. railroad shops, being only that part of said tract, however, that lies on the west side of said Charleston, Cincinnati & Chicago Railroad Company's right of way. This tract lies between Prince street on the south, the right of way of said railroad on the east, Iron street on the north, and an alley dividing blocks "D" and "E" and & "F" on the west; also a tract of land beginning at the intersection of the right of way of the E. T., V. & G. railway on the east side of Broadway, running thence with said right of way to the east
37 line of Millard farm; thence with said line in the southeasterly direction to a set stone on the bank of Brush creek near a ford; then south 37 5′ W. 614 feet to an oak stump; thence south 4.7 to the east side of Broadway; thence with said east side of Broadway to the beginning, containing five acres, more or less.

Also a tract of land known as the Williams farm and conveyed by I. N. Williams and M. D. Williams to the Carnegie Land Company, containing 200 acres, more or less. Reference is here made to the deed of conveyance. Also those parcels of land conveyed to S. H. Pouder by the King heirs, and by S. H. Pouder and wife to the Carnegie Land Company, and also by the King heirs *by* H. E. Dean, and by said Dean to the Carnegie Land Company, it being the intention thereof to exclude the Ruth King farm; also a tract of land conveyed by Martha Barnes and W. B. Tucker and wife to F. A. Stratton on the 5th day of August, 1889, and by F. E. Stratton to J. T. Wilder, and by J. T. Wilder to the Carnegie Land Company, containing 193 acres, more or less.

Also a tract of land known as the Maden farm and one-half of the Susan Barnes tract and conveyed by William Maden and wife to E. G. Gilliam, agent for J. T. Wilder, and conveyed by representatives of said Gilliam to the Carnegie Land Company, said tract containing 220 acres, more or less; also a certain block marked 42 on the map of the Carnegie Land Company's addition to Johnson City, that block lying between Broadway, Fifth avenue, Center street, and Fourth avenue; also the tract or parcel of land lying between 9th avenue, Broadway, Twelfth avenue, and North

Main street for use as a public park; also two tracks of land designated on the map of the Carnegie Land Company's addition as being plats for the track yards of the C., C. & C. R. R. and the E. T., W. N. C. R. R. on the east side of the East Tenn., Virginia & Georgia Railway Company's tracks, said track yards extending from New street on the south of Broadway on the
38 northeast, including also the right of way designated as the right of way of the East Tennessee & Western North Carolina railroad on said map; also excepting that strip of land between Centre street, First avenue, North Main street, and Brush Creek or Short avenue, being about ⅔ of an acre; also excepting that parcel of real estate described as follows: Beginning at the south corner of Broadway and First avenue and running thence with the west side of Broadway 300 feet to a point on the said line of Broadway, then parallel with First Avenue to Brush Creek or Short avenue, thence with said Brush Creek or Short avenue to the point of intersection of said Short avenue with the east line of Centre street, thence with the east side of Centre street to the corner of said street and First avenue, thence with the west side of said First avenue 400 feet to the beginning, containing two acres, more or less.

And subject to such reservations there *was* conveyed in said deed of trust or mortgage all the corporate property and franchises of said company, whether the same were then held or owned or thereafter to be acquired by it, and also all the machinery, implements, tools, and other materials, property, and assets whatsoever now owned or possessed by the said Carnegie Land Company or which at any time thereafter should be owned or possessed by it, its successor or successors, for use in connection with or for the operation, maintenance, or reparation of said property or any part thereof, and also all the rights, easements, exemptions, privileges, and franchises which said Carnegie Land Company did then hold, possess, or was then entitled to, and also all the rights, privileges, and franchises it should thereafter acquire or become possessed or entitled to or in respect to the purposes or use of the said property or the operation or maintenance of the same, and also all the rights, issues,
39 and profits thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well *as* at law as in equity, that the said company might have to the same and every part thereof; to have and to hold all and singular the said lands, property, rights, interest, franchises, tolls, income, immunity, privileges, and all other things hereinabove named to the said party of the second part as trustee aforesaid and his successors and assigns forever, in trust, nevertheless, for the equal *pro rata* use, benefit, and security of all persons and corporations who shall become or be owners or lawful holders of any of the said bonds secured or intended to be thereby secured, as aforesaid, which shall be hereafter issued, or any of the coupons appertaining thereto, without preference of any of the said bonds or matured coupons over any or either of the others by reason of the priority in the time of the issue or negotiation thereof or otherwise, and to and for the uses and purposes and with the powers and authorities and

bject to the covenants and conditions thereinafter set forth; and
r a further and more particular description of said mortgage, as
ll as the conditions, provisions, recitals, and stipulations therein
ntained, complainants refer to a true copy of said mortgage or
ed of trust, which is here annexed, marked Exhibit "A," and
hich complainants pray may be taken as a part of this bill as
lly as if incorporated in the body of it, and your orator- prays
ave to refer to the original of said deed of trust upon the hearing
this cause if deemed necessary.

V.

Complainants would next show your honor that complainant
Vilberforce Sully, as trustee, duly accepted the trust created in and
y said mortgage or deed of trust, and thereupon the same was
uly registered in the office of the registry of Washington county,
Tennessee, on February 10th, 1893, in Trust Deed Book No. 8,
page 70.

40

VI.

Complainants would further show that on the first day of July,
1893, and on the first day of January, 1894, and at each recurrence
of the six months' periods as provided by said bonds and by said
mortgage, the holder and owner of said mortgage bonds hereinbe-
fore described and the coupons annexed to said bonds, the said
owner being complainant A. B. Carhart, was entitled to collect and
receive from defendant Carnegie Land Company the interest so
falling due upon said bonds, and that upon said days the holders of
said bonds duly presented said interest coupons and demanded pay-
ment thereof, said demand of payment of said bonds being accom-
panied by an offer to surrender the same, but said Carnegie Land
Company made default in the payment of said interest coupons
falling due on the several days, according to the tenor and effect of
such bonds and coupons, and said semi annual instaliments of inter-
est and said coupons remain wholly due and wholly unpaid, and
default having been made thereof for more than three months, there-
fore defendant The Carnegie Land Company made default in the
performance of the terms and conditions of said bonds and said
mortgage, and conditions thereof were broken.

VII.

Complainants would further show unto your honor that in and by
the terms of said mortgage or deed of trust so executed to secure
the payment of said bonds, principal and interest, it is provided
that if default be made in the payment of the interest mentioned in any
of the said bonds or coupons, and if such default continue for ninety
days, then all of said bonds then outstanding should become imme-
diately due and payable, principal and interest, unless the owners
of a majority of said bonds then outstanding should, at a
41 regular meeting called for that purpose, decide to the contrary,
and complainants here state to your honor that there has been

no decision to the contrary by the owner of any of said bonds as above provided.

VIII.

Complainants would further show that the said deed of trust further provides that if default be made in the payment of the principal and interest mentioned in the said bonds or coupons according to their tenor and effect, and if such default continue for a period of ninety days after said principal and interest shall have become due and demanded, or if default be made in performance of any of the covenants contained in this mortgage, and if such default continues for six months, then in that case the said trustee complainant, his successor or successors, might, if he deemed such action necessary for the protection of the bondholders and when thereunto requested in writing by the holders of a majority of the said bonds then outstanding and upon being properly indemnified against costs and expenses that might be incurred by action in pursuance of said request, should forthwith enter upon and take possession of all the property therein conveyed and of the records, books, and papers of the said Carnegie Land Company, and in person or by one or more agents have, hold, and use the same, subject to the lien of said mortgage, and operate and conduct all the business of the same and make such repairs, alterations, additions, and improvements as he should deem proper for the operation of said premises and property, and after deducting all necessary and proper outlays for expenses, taxes, costs, charges, and counsel fees in the premises, as well as just compensation for his own services and the services of such agents and employees as he might employ in the exercise of his discretion for any of said purposes, he should apply the rest of said monies after paying all taxes, as-
42 sessments, and prior liens to the payment alike of interest and principal due upon such of the bonds as should remain outstanding, and pay the remainder to the defendant or as any court of competent jurisdiction should order, provided, however, further, that in case said trustee should take possession of said property and should be able out of the income of the property to *apy* all arrearages of interest due on said bonds, and when a majority of said bondholders in writing should waive default, said trustee should have the right to restore the property to defendant, and upon default and entry, as aforesaid, or without such entry, it is provided in said deed of trust that the said trustee should have the right to proceed to sell the mortgaged property, either by virtue of power of sale therein contained or by proceedings in a court of equity in the manner and for the purposes therein prescribed, and complainants will here state that there having been, as before stated, a default in the payment of said interest, and a consequent maturity and no payment of the principal, and demand having been made by the holder of said outstanding bonds, this suit is brought in equity for the purpose of foreclosing said deed of trust as therein stipulated and provided; and it is further provided in said deed of trust that, instead of selling the said property by ad-

vertisement, complainant, as trustee, might, in the event of default aforesaid and upon request of a majority of the holders of the bonds then outstanding and upon being indemnified as aforesaid, all of which as to request and indemnity, a default having been made, having been complied with, proceed by suit or suits in equity or at law as the said trustee might be advised by counsel to enforce the payment of said bonds or to foreclose the mortgage and sell the property thereby conveyed, and should be entitled to a receivership of all of said mortgaged property and the rents,
43 issues, and profits thereof during the pendency of any such legal proceeding, and it is further provided that none of the remedies therein contained should be construed to deprive said trustee or the beneficiaries under said trust deed, acting through said trustee, of any legal or equitable remedy by judicial proceeding appropriate to enforcing the provisions of said instrument, and it is further provided in said instrument that upon any sale made in pursuance to the terms of the provisions of said deed of trust the purchaser should be entitled to use the bonds therein secured or any of them in payment of the purchase price and should receive credit for the bonds so used for an amount of cash equivalent or equal to the aggregate of amount of a *pro rata* share or dividend to which the bonds so used shall be entitled out of the proceeds of said sale. It is further provided that complainant, as trustee, should be entitled to reasonable compensation for all sercices rendered by him and for his counsel fees and for any other costs and expenses proper and incident to the administration of his trust and the winding up of the same.

IX.

Complainants would here aver that said Carnegie Land Company has made default in the payment of its interest on said bonds so secured by said mortgage, as hereinbefore shown, and that said default has continued for a period of three months and longer, and complainants, in the exercise of the option conferred upon them by the terms of said mortgage or deed of trust, have before declared and do now declare the entire principal of said bonds now due and payable, and complainants further aver that the trustee, complainant Sully, has been requested by complainant Carhart, the holder and owner of the entire amount of outstanding bonds secured by said deed of trust, in respect of which and with the coupons
44 upon which said default has been made, to proceed by suit as they may be advised by counsel to enforce payment of such bonds, to foreclose the said mortgage, and to sell the Carnegie Land Company's property of every description conveyed by and subject to the provisions of said mortgage or deed of trust upon judgment of a court of competent jurisdiction.

X.

Complainants would further show your honor that on or about Nov. 29th, 1893, an original bill was filed by the American National Bank *et al.* in your honor's court against The Carnegie Land Com-

pany *et al.*, alleging, among other things, that they were the holders and owners of certain debts against the defendant to the amount of several thousand dollars, and that the same were due and unpaid, and also averring that some indebtedness was created against the defendant Carnegie Land Company by endorsement, and that said defendant was insolvent and owed *bona fide* debts to over $200,000.00 to various parties, individuals, firms, and corporations, resident and non-resident of the State of Tennessee; and they further averred that said indebtedness was exclusive of $300,000 00, which — is stated that defendant claims, according to the information and belief of said complainants in said bill, to be a mortgage lien upon said property and a debt against the same. Said bill further set out and averred that defendant was incorporated June 26th, 1889, and established an office at Johnson City and where the holders and owners of large amounts of property, much of which, it avers, was of speculative value. The said bill further alleges that a general assignment was made by defendant and registered in volume 9, Deeds of Trust, pp. 32 to 45, inclusive, in the register's office for Washington county, Tennessee, the 3rd day of June, 1893, with a schedule of its assets and liabilities attached.

45 Said complainant- sought to file said bill as a general creditors' bill against defendant, and the same was sustained as such by your honor, and the assets of said Carnegie Land Company, defendant, are now being administered in this cause in the chancery court, except that no receiver has been appointed in said cause and the assignee under the said general assignment *in* now administering the trusts conferred upon him in said instrument. Complainant would here state that nearly all of the assets, if not all of them, in the hands of said assignee and sought to *ne* impounded by the bill filed in your honor's court, which was sustained as a general creditors' bill, are covered and conveyed to complainant Sully as trustee by the deed of trust hereinbefore set out, and that complainant Carhart, the holder of the outstanding bonds of defendant company, is entitled to priority over all other creditors of the said defendant in the appropriation of the assets covered by the deed of trust executed to Sully as above stated. Complainants would here state that neither of them was made a party to the said bill of The American National Bank *et al. vs.* The Carnegie Land Company *et al.*, hereinbefore set out and sustained by your honor as a general creditors' bill, and complainants are not advised as to what other creditors, if any, have filed their claims seeking the benefit of the bill of the American national bank, so sustained by your honor as a general creditors' bill.

The premises considered, complainants pray that they may be allowed to file this bill as an original bill in your honor's court against defendant The Carnegie Land Company, or if for any reason this should not be done that they may be allowed to file the same in the said cause of The American National Bank *et al. vs.* The Carnegie Land Company *et al.* as a petition in the nature of a cross-bill against the said Carnegie Land Company; that process

46 issue and be served upon the said Carnegie Land Company, publication be made for def. Travelers' Ins. Co. & def. Con-

necticut Trust & Safe Deposit Co., they be required to answer complainants' bill fully and particularly, but not under oath, the same being waived; that amounts due and unpaid for principal and interest upon said mortgage bonds secured by said mortgage or deed of trust to complainant Wilberforce Sully, as before stated, and now unpaid and outstanding, may be ascertained and fixed and payment thereof by defendant, the said Carnegie Land Company, decreed by this court; that the lien of said deed of trust may be ascertained and decreed a first lien prior and superior to all other claims upon the premises and property therein described and embraced; that said mortgages or deeds in trust to complainant Sully & defendant Connecticut Trust & Safe Deposit Co. may be foreclosed, and that all the premises and property, rights and franchises covered by or embraced in the said mortgages may be adjudged and decreed to be sold under your honor's decrees for the satisfaction of the recovery upon said bonds and interest to be had in this court and as provided in the said deeds in trust to secure the same; that under such sale defendant land Co. and all persons claiming under it subsequent to the recording of said mortgage may be declared barred of all right, claim, title, lien in and to any of the premises, properties, rights, and franchises so sold and conveyed as subject to said mortgages, and that actual possession of said premises, properties, rights, and franchises so sold and conveyed may be declared to be in execution and enforcement of the liens created by said mortgages; that from the proceeds of said foreclosure sale complainant Sully may be paid his costs and expenses in this suit and of the execution of his trust and all payments and counsel fees, and other necessary expenses of the property, of any such should
47 be, and his reasonable compensation for the performance of said trust, and that the residue of the proceeds — said sale may be paid and applied under the orders and decrees of your honor's court to the payment of the principal and interest of said mortgage bonds secured by said mortgage or deed of trust, together with the interest on overdue interest down to the time of sale, and that pending this suit some suitable person may be appointed by your honor in order that the property may be directly under the control of the court and in pursuance of the provisions specifically set out and authorized by the said deed in trust to foreclose which this bill is filed, permanent receiver to take possession of all and singular the said mortgaged property, with such powers as your honor may deem right and proper.

Complainants further pray for all such other, further, different, and general relief as they may be entitled to under the facts in equity and good conscience.

(Signed) SHIELDS & MOUNTCASTLE,
Sol's for Compl'ts.

STATE OF TENNESSEE, }
Hamblen County. }

Personally appeared before me, the undersigned authority, R. E. L. Mountcastle, of counsel and agent for complainants, who made oath

that the facts stated in the foregoing bill are true to the best of his knowledge, information, and belief.

(Signed) R. E. L. MOUNTCASTLE.

Sworn to and subscribed before me this 16th day of May, 1895.

(Signed) GEO. S. CROUCH,

[SEAL.] *Notary Public.*

48 *Answer of Complainants to Sully Bill.*

The joint and separate answer of the American National Bank of Nashville, Tennessee; Shields Bros., of Knoxville, Tenn., and Scioto Star Fire Brick Works, a corporation under the laws of Ohio, on behalf of themselves and all other *bona fide* creditors of the Carnegie Land Company, to the bill or petition of Wilberforce Sully *et al.* against Carnegie Land Company *et al.*, heretofore consolidated with the cause of The American National Bank *et al. vs.* Carnegie Land Company *et al.*

Respondents, saving and reserving to themselves the benefit of exceptions to all the errors and insufficiencies in said bill contained, for answer to so much and such parts thereto as they are advised it is material they should answer, answering, say—

That they come and defend said bill and resist its prayer for relief, leave of court being first had and obtained allowing complainants to become parties defendant to said suit of Wilberforce Sully, and they present their answer in their own behalf and in behalf of all other *bona fide* creditors of the Carnegie Land Company.

They admit that the Carnegie Land Company is a corporation under the laws of Virginia; said corporation heretofore acquired property and had an office at Johnson City and is now being wound up in your honor's court at Johnson City and in this cause as an insolvent corporation.

Respondents deny that the said Carnegie Land Company, on the 2d day of January, 1893, or a*y* any time, executed any mortgage to secure the $300,000.00 bonds mentioned which had or could have any binding force or effect, or that was in any way operative.

Respondents admit that the said Carnegie Land Company did contemplate the issuance of bonds prior to the 2d day of Janu-
49 ary, 1893, and that a paper was prepared purporting on its face to be a mortgage, but respondents insist that the said paper never performed any office and never became a security, and respondents deny that in law or in fact any bonds were ever issued under said mortgage, and they deny that the Carnegie Land Company ever in any way or manner, either in law or in fact, authorized the issuance of any bonds thereunder to be secured thereby.

It may be true that the Carnegie Land Company at the time said paper was prepared, or theretofore or thereafter, did have printed a series of bonds, three hundred in number and for $1,000.00 each, but respondents again deny that any of said bonds were in fact ever issued, or that the Carnegie Land Company ever authorized

the issuance of same or ever attempted to issue or negotiate the same.

Respondents deny that eighty-five of said bonds were negotiated for value received by defendant Carnegie Land Company to complainant A. B. Carhart, or to any one else, and they deny that said bonds are now owned or controlled by said Carhart, and they dent that he has any title thereto or interest therein, and respondents here call for strict and full proof as to the issuance and negotiation of said bonds as aforesaid.

And respondents deny that said bonds constitute any binding obligation as against the Carnegie Land Company. They deny that their issuance was ever authorized. If it be a fact, as alleged in the original bill, that complainant Carhart has in his possession any of said bonds, and if it is a fact that the said Wilberforce Sully certified the same to said Carhart, as stated in the bill, such receiving and certification of said bonds was not a *bona fide* transaction, and was a fraudulent scheme and devise to cheat and defraud the said Carnegie Land Company and its creditors.

50 Your honor will observe that the date of said transaction is not shown in said bill, and respondents are advised and believe that the withholding of said date was for a fraudulent purpose, and that if the true date of said transaction were given to your honor, that fact of itself would defeat said pretended claim.

Again, respondents show that the said Sully was the treasurer for the Carnegie Land Company, and this fact is withheld and not stated in said bill, and said Sully knew full well at the time he delivered said bonds, if the same were delivered, that their delivery and negotiation had never been authorized by the Carnegie Land Company, and the said Carhart in accepting said bonds could not have received the same as an innocent purchaser or holder for value, because upon the paper presented by said complainants said bonds and said mortgage referred to each other, and said Carhart was bound to know the terms and conditions of the mortgage, because said bonds referred to same with its various provisions, and said morigage on its face provided specifically and particularly the mode and only mode by which said bonds could be issued, sold, or negotiated.

Respondents would further state that the Carnegie Land Company, its officers and agents, knew nothing of the issuance of any bonds or of any claim that the same were issued until long after the beginning of this general creditors' suit, and the answer of the Carnegie Land Company filed to the bill of the American national bank on December 8th, 1893, and sworn to by the secretary of said company, J. W. Cure, states in effect that none of said series of the $300,000.00 of bonds were ever issued, and J. T. Wilder, the president of said company, on the 3rd day of June, 1893, executed the assignment mentioned in the record, and in said assignment shows

51 that the said bonds and no part thereof were ever in fact issued, and in the schedules of assets and liabilities of said Carnegie Land Company said $300,000.00 appears in each, first as a liability and then as an asset, and these schedules are

sworn to by said J. W. Cure, the secretary of said company. It would, indeed, be a remarkable fact if said bonds had been issued, and that without the knowledge of the president and secretary of said company.

Complainants do not state with fairness the allegations of the original bill filed by the American national bank. They fail to note that on page 9 and 10 respondents allege that these bonds are undisposed of—still in the hands of its treasurer and utterly valueless, &c., &c.

Respondents will here show that even if said mortgage were valid and said $85,000.00 of bonds were in fact issued, the debts sued on by the American national bank and Shields Bros. were contracted by the Carnegie Land Company and owing long before the execution and registration of said mortgage, and that therefore these debts owing to citizens and residents of Tennessee prior to the execution and registration of said mortgage would have priority under the law over any debt secured or pretended to be secured by said mortgage.

Respondents assume that J. T. Wilder, the president, and J. W. Cure, the secretary of said Carnegie Land Company, stated the facts in reference to said bonds and mortgage when they executed and filed the assignment and the answer in the American National Bank case, and understanding the facts as they did, it is their duty to make every possible resistance to the bill of said Sully; and yet, in so far as respondents can learn, the said Carnegie Land Company, its officers, agents, attorneys, &c., are making no defence to this unjust demand and have not done so, and its regularly retained counsel, as will appear from the records of this court, have
52 been relieved and have retired from making any defence to the bill of said Sully.

These facts lead respondent to ask your honor to at once make an order herein directing said J. W. Cure to turn over to the clerk & master of this court the books of said Carnegie Land Company, especially the book or books containing the records of the meetings of its board of directors, for safe keeping and as evidence in this cause.

Said books are of the utmost importance to respondents and all other *bona fide* creditors of said Carnegie Land Company: and respondents are advised that the said books in their present condition do not show that said Sully or any one was ever authorized to issue, negotiate, sell, or place as collateral the said $85,000 of bonds or any part thereof.

And respondents believe that said books and records will go far in proving a fraudulent scheme or combination upon the part of said Sully, said Carhart, and perhaps others to unlawfully and fraudulently possess themselves of said $85,000.00 of bonds.

And each and all of the allegations in said bill not hereinbefore admitted are each and all denied.

And, having fully answered, respondents pray to be hence dismissed with their costs.

(Signed) DEADERICK & EPPS,
REEVES & BAXTER,
Sol'rs for Respondents.

Endorsed: American National Bank of Nashville, Tenn., *et al. vs.* Carnegie Land Company *et al.* and Wilberforce Sully *et al. vs.* Carnegie Land Co. *et al.* Filed August 2nd, 1895. C. W. Dodge, D. C. & M. Answer of American National Bank and others to bill of Sully *et al.* Deaderick & Epps and Reeves & Baxter.

53 *Answer of the Travellers' Insurance Co. & the Conn. Trust & Safe Dep. Co.*

The joint and separate answer of the Travellers' Insurance Company and the Connecticut Trust and Safety Deposit Company to the original bill of Wilberforce Sully and A. B. Carhart, filed against them and the Carnegie Land Company in the chancery court at Johnson City, Tenn., by a special permit of the chancellor, on the — day of ——, 1895, and consolidated with the cause of The American National Bank *et al. vs.* The Carnegie Land Company *et al.* in the said chancery court.

These respondents, answering, say: They are each corporate bodies under the laws of the State of Connecticut, as charged, and it is true that their codefendants, The Carnegie Land Company, a corporation under the laws of the State of Virginia, is indebted to respondent Travellers' Insurance Company in the sum of thirty thousand dollars, as charged, and also in the further sum of nearly three years' interest on said sum, and also in other sums, amounting to several thousand dollars, and it is also true that said indebtedness is secured on what is known as the Carnegie Hotel property, including the hotel and its furnishings and the plot of ground on which the hotel stands, being the fourteen lots set out in compl'ts' bill, and that respondent The Connecticut Trust and Safety Deposit Company is the trustee in said trust deed.

These respondents deny that the Carnegie Land Company, on the 2nd of January, 1893, or at any other time, "in the pursuance of the power and authority by it in that behalf possessed and in pursuance of due corporate action, resolved and determined to issue its corporate bonds" to the amount of 300, numbered from 1 up to 300 consecutively, each for the sum of one thousand dollars, to bear date Jan'y 1st, 1893, interest payable semi-annually, &c., and
54 that on the same day, to wit, Jan'y 2nd, 1893, or at any other time, said Carnegie Land Company, "in the due exercise of the power and authority by it in that behalf possessed and pursuant to due corporate action of the company," executed and delivered to compl't Wilberforce Sully a deed in trust on the Carnegie Land Company's property, in compl'ts' bill set out, to secure said bonds. These respondents call for strict proof, both as to the authority for issuing bonds and the authority for executing such a trust deed.

It may be true that the Carnegie Land Company contemplated the issuance of such bonds and the execution of such a trust deed to secure them, and there may have been bonds, of the numbers and amounts set forth, printed, and a trust deed prepared like unto the one named, but that any bonds were authoritatively issued or that any such trust deed was by due authority executed is denied. If such bonds were printed and if such trust deed was executed

and registered, it was to have the security a matter of record so as to enable the company to place the bonds, which was never done in whole or in part; but that any bonds were ever in fact or in law issued or were lawfully negotiated to compl't Carhart is denied, and strict proof of the allegation is demanded.

Very significantly, the dates of the alleged issuance and of the alleged negotiation to Carhart are not stated in the bill, and the fact that Sully was and is the treasurer of the Carnegie Land Company is omitted from the bill, and the omission savors of suppression, and respondents here state that the Carnegie Land Company, in June, 1893, made a general assignment, J. W. Cure, the secretary of the company, being named as assignee; that Gen. J. T. Wilder, as president of said company, and J. W. Cure, as secretary for it, executed the deed of assignment in which said 300 bonds were set out in the schedule as undisposed of, and J. W. Cure swore
55 to the correctness of the schedule; and said president and said secretary, on June the 3rd, 1893, having no knowledge of the sale of 85 of these bonds, it is denied that they ever were lawfully negotiated by the Carnegie Land Company or that they were negotiated at all by said company, and if comp'l't Carhart is in possession of the 85 bonds his possession is unlawful and in pursuance of a scheme on the part of himself and others to cheat, wrong, and defraud the Carnegie Land Co. and its creditors. That he is in any sense an innocent holder of said bonds is denied.

Respondents show that their debt against the Carnegie Land Company is older than that claimed by compl'ts, of which also they had full knowledge, and whilst they do not claim priority over respondents' debt as to the hotel property nor even pray for priority over any creditors, except "persons claiming under it" (the C. L. Co.) "subsequent to the recording of said mortgage," Feb. 10, 1893, yet it is denied that compl'ts have any such debt as claimed or have any lien of any kind on the property of the Carnegie Land Company.

It is admitted that the American National Bank *et al.* filed a bill in the chancery court at Johnson City, Tenn., about Nov. 29th, 1893, *vs.* The Carnegie Land Co. *et al.*, and that it has been sustained as a general creditors' bill, and compl'ts in this case probably quote correctly allegations in the bill in this case, so far as they go, but conveniently omitted to state the allegation in said bill and that all of said 300 bonds were undisposed of.

These respondents deny the right of compl'ts to any relief, and all allegations in said bill not expressly admitted nor hereinbefore specifically denied are here and now denied and strict proof of each and all of them demanded, and, having fully answered, these
56 respondents pray to be hence dismissed, &c.

(Signed) THE TRAVELLERS' INSURANCE CO.,
Per E. C. REEVES, *Sol.*
THE CONNECTICUT TRUST & SAFETY DEP. CO.,
Per E. C. REEVES, *Solicitor.*

CARR & REEVES, *Solicitors.*

Endorsed: Wilberforce Sully *et al. vs.* The Carnegie Land Co. *et al.* Answer of the Travellers' Ins. Co., the Conn. Tr. & S. Dep. Co. Filed Sep. 28th, 1895. C. W. Hodge, D. C. & M.

57 *Petition of Travelers' Insurance Co.*

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

To the Honorable John P. Smith, chancellor:

The Travelers' Insurance Company of Hartford, Connecticut, respectfully show to your honor that the Carnegie Land Company is justly indebted to it for borrowed money in the sum of $30,000.00, thirty thousand dollars, with some accrued interest; that the same is shown and evidenced by note, properly executed, a copy of which is here shown to the court and marked Exhibit "B" to this petition. To secure the payment of this note the said Carnegie Land Company executed a deed of trust on certain property in Johnson City, described as follows:

1st. Lots Nos. 1, 2, 3, 4, 5, 6, 7, 17, 18, 19, 20, 21, 22, and 23, in block six, of said land company's addition to Johnson City, Tennessee, bounded on the south bt First avenue, on the west by Center street, on the north by Second avenue, on the east by lots 8 to 24.

2nd. All and singular the furniture, property, fixtures, and appliances in and belonging to said Carnegie hotel, consisting of beds and bedding, carpets, tables, chairs, settees, lounges, sofas, window curtains, table ware, kitchen furniture, &c., all in said hotel building.

A copy of said trust deed is here shown to the court and marked Exhibit "E" to this petition.

Petitioner prays to be allowed to become a party to this cause and to have said note *and* declared a preferred claim and paid in full out of the proceeds of the sale of the property named in
58 Exhibit "E."

Petitioner prays for all such other, further, and different relief as it is entitled to and for general relief.

TRAVELERS' INSURANCE CO.,
By H. H. CARR, *Sol.*

CARR & REEVES, *Sols.*

STATE OF TENNESSEE,
Washington County.

Personally appeared before me, C. W. Hodge, dep. C. & M., H. H. Carr, agent and attorney for petitioner, and made oath that the facts in the foregoing petition are true to the best of his knowledge and belief.

(Signed) H. H. CARR, *Agent, &c.*

Sworn to and subscribed before me on this the 5th day of May, 1894.

C. W. HODGE, *D. C. & M.*

59 JOHNSON CITY, TENNESSEE, *Jan. 4th*, 1896.

Hon. John P. Smith, chancellor, holding the chancery court at Johnson City for the ninth civil district of Washington county, Tennessee:

The Travellers' Insurance Company of Hartford, in the State of Connecticut, would most respectfully show unto your honor:

I.

That on May 5th, 1894, petitioner presented *his* petition to your honor in the cause of The American National Bank *et al. vs.* Carnegie Land Co. *et al.* pending in your honor's court, and, among other things, alleged that the Carnegie Land Co. is justly indebted to it for borrowed money in the sum of $30,000.00, with accrued interest; that the same is due by note properly made, Ex. B. To secure the payment of this note said Carnegie Land Co. executed a deed of trust on certain property in Johnson City, described as follows:

First. Lots 1, 2, 3, 4, 5, 6, 7, 17, 18, 19, 20, 21, 22, 23, in block 6, in said land Co.'s addition to Johnson City, bounded on the south by First avenue, on the west by Central street, on the north by 2nd Ave., and on the east by lots 8 & 24.

Second. All and singular *of* the furniture, property, fixtures, and appliances in and belonging to said Carnegie hotel, consisting of beds and beddings, carpets, tables, chairs, settees, lounges, sofas, window curtains, table ware, kitchen furniture, etc., all in said hotel building. A copy of said trust deed, marked Ex. E, was exhibited with said petition. To this petition was added the following prayer: To be allowed to become a party to this cause, and have said note and debt declared a preferred claim, and to be paid in full out of the proceeds of the sale of the property named in Ex. E, and

60 for general relief.

2nd.

And petitioner would further state that P. Fleming & Co. obtained a decree in your honor's court on the fifth day of June, 1894, against F. A. Stratton, principal; C. Elmandorf and M. A. Elmendorf, securities for said Stratton (for the sum of $1,180.59), and costs, and that said sum in said proceeding was declared to be a lien on lots Nos. 1, 2, 3, 4, 5, 6, 7, 17, 18, 20, 21, 22, 23, in block 6, in the Carnegie Land and Improvement Co.'s addition to the town of Johnson City, Washington county, Tennessee, and that said property was ordered to be sold for the satisfaction of said decree.

Petitioner would further state and show unto your honor that it paid off the amount of said decree in favor of the P. Flemming Co. and took an assignment of said decree and lien, and that on the 5th day of Dec., 1894, a decree was entered in your honor's court confirming said assignment and adjudging that petitioner, Travel

lers' Insurance Company, in consideration of the foregoing facts and by agreement of the parties, "be, and they are hereby, substituted to all the right, title, interest, and liens that compl't (P. Fleming & Co.)" had in this cause by virtue of the former decrees pronounced herein; and it is further ordered that whenever said Travellers' Insurance Co., its agent or solicitor, shall request the clerk & master of this court to do so, that he shall proceed and sell the aforesaid property as directed in said decree of June 6th, 1894, for the purpose of paying to said Travellers' Insurance Co. the amount of said decree, interests, and costs of sale, etc.

The petitioner would further state that on the property named in said deed of trust and on that named in the decree in favor of P. Fleming & Co. is situated what is known as the Carnegie Hotel property, except lot 24, *is* named in the decree in favor of
61 P. Flemming & Co., but said lot is not embraced in said deed of trust.

3rd.

Petitioner would further state that it is advised that there are certain unpaid taxes against what is known as the Carnegie Hotel property and the lots therewith connected that it will be necessary for this petitioner to pay in order to protect its lien, and that it has also been necessary to advance certain money to the Carnegie Land Co. to keep up said hotel property insured. Petitioner would further state unto your honor that under a decree pronounced in this cause said hotel property was sold on the 2nd day of December, 1895, and was bid in by this petitioner at the price of $25,000.00.

Petitioner would further state unto your honor that the deed of trust executed to secure a note of $30,000.00 of borrowed money conveyed the legal title in said hotel property to the Connecticut Trust & Safe Deposit Company of Hartford, Conn.

Petitioner would further state that since said sale and purchase it was ascertained that the aforesaid trustee was not before the court in the first above named cause, and it is advised that in order to secure a perfect title to said property that said trustee should be brought before your honor's court, to the end that title be divested out of it and vested in petitioner.

Petitioner avers and charges that P. Flemming & Co. were residents of Tennessee at the time the debt was contracted, and that *the* was prior, to the registration of the mortgage to secure the bonds.

Prayer.

Petitioner prays that it be allowed to file this petition in the cause of The American National Bank *et al. vs.* The Carnegie Land Co. *et al.*, and that it be taken in the nature of a cross-bill;
62 that the Connecticut Trust & Safe Deposit Company of Hartford, Conn., the Carnegie Land Co., Wilberforce Sully, John W. Cure, assignee and receiver, be made parties defendant to this petition or cross-bill.

4th.

That publication be made to bring said Connecticut Trust & Safe Deposit Co. before your honor's court, unless it causes its appearance to be entered. Petitioner prays that the amount of its bid for said hotel and real estate connected therewith be entered as a credit upon said note for $30,000.00, and that it be allowed to share with other creditors in the distribution of the assets of said land Co. as to the balance remaining due on said note, and also as to amounts paid on insurance. 2nd, that as to amount on taxes and to P. Flemming & Co., that it be allowed as a Tennessee creditor to participate in the distribution of the assets of the said Carnegie Land Co.

Petitioner prays that the title to said property be divested out of the Connecticut Trust & Safe Deposit Co. and vested in petitioner. Petitioner also prays that it may have a sale of lot No. 24, named in the decree in favor of P. Flemming & Co., and that the proceeds of said sale be applied as a credit on the amount paid to said P. Flemming & Co. by petitioner.

Petitioner prays for all other, further, and different relief it is entitled to and for general relief.

TRAVELLERS' INSURANCE CO.,
By H. H. CARR, *Sol.*

CARR & REEVES, *Sols.*

63 *Petition of Mary P. Myton and A. B. Carhart. Filed Oct. 11th, 1895.*

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.,

and

WILBERFORCE SULLY, Trustee, ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

In Chancery, at Johnson City.

The petition of Mary P. Myton, a resident of the city of New York, and of A. B. Carhart, a resident of the city of Brooklyn, filed in the above-styled cause.

Your petitioners would respectfully show unto your honor:

I.

That the case of The American National Bank *et al. vs.* Carnegie Land Company *et al.* was brought in your honor's court for the purpose of winding up the Carnegie Land Company as an insolvent corporation and for the purpose of distributing its assets among its creditors, and for that purpose was sustained as a general creditors' bill and all creditors invited by publication to file their claims and

rticipate in the division of its assets; that the cause of *the* Wilber-rce Sully, trustee, *et al. vs.* Carnegie Land Company *et al.* was rought in your honor's court for the purpose of foreclosing a deed trust executed by defendant company to Wilberforce Sully in ust to secure a bonded indebtedness owned by petitioner A. B. arhart.

II.

Your petitioner Mary P. Myton would show to your honor that she is the holder and owner of a note made by the Carnegie Land Company for the sum of $10,141.67, due one ay after date, May 25, 1893; that upon this note there has been aid, by the sale of certain collateral bonds of the Carnegie Land ompany, the sum of $4,495, and also had been paid by the sale of ertain bonds of the Carnegie Iron Company $2,475, thus making total credit of $6,970 of date Nov. 27, 1894, while at that date, Nov. 27, 1894, the amount of said note, principal and interest, aggre-gated the sum of $11,064.54, which left still due and unpaid upon aid note at the above date the sum of $4,094.54, which, together vith the interest upon the same from Nov. 27, 1892, is still due, owing, and unpaid to your petitioner.

Said note is herewith filed as Exhibit "A" to this petition.

III.

Your petitioner A. B. Carhart would respectfully show unto your honor that he is the holder and owner of a note executed by the Carnegie Land Company for the sum of $14,046.66, due on demand after date, March 1, 1893, with six per cent. interest thereon until date of payment; that upon said note there has been paid by the sale and credit of certain collateral bonds of the Carnegie Land Company the sum of $8,400, of date Nov. 27, 1894; that the amount of said note of $14,046.66, due at said date, Nov. 27, 1895, with interest, amounted to the sum of $15,514.53, leaving a balance upon said date due and owing to your petitioner A. B. Carhart, the sum of $7,114.53; that upon said balance of $7,114.53 defendant Carnegie Land Company is entitled to other credits growing out of purchase of certain land by petitioner of defendant Carnegie Land Co., not otherwise paid, the sum of $4,865.87, which leaves still due, owing, and unpaid to your petitioner A. B. Carhart on said note, after giving all just credits to the Carnegie Land Co., the sum of $2,248.66.

Said note so executed by the Carnegie Land Company is herewith filed as Exhibit "B" to this petition and prayed to be taken as a part hereof.

IV.

Premises considered, your petitioners pray that they may be permitted to file this petition and become parties to the above-styled causes for the purpose of setting up their said demands; that they are valid, just, and subsisting obligations to the extent set out of the Carnegie Land Company, and they pray for a decree against

said company for the amount of their said demands unpaid and owing, with proper interest, and that their said decrees when taken may be paid under the orders and decrees of your honor's court out of the assets of the Carnegie Land Company, now being administered in the above causes in their proper class.

Petitioners pray for general relief.

SHIELDS & MOUNTCASTLE, *Solicitors.*

STATE — TENNESSEE, }
Hamblen County. }

Personally appeared before me, the undersigned authority, R. E. L. Mountcastle, of counsel for petitioners and agent therefor, who makes oath that the facts stated in said petition are true to the best of his knowledge, information, and belief.

R. E. L. MOUNTCASTLE.

Sworn to and subscribed before me this Oct. 11, 1895.

GEO. S. CROUCH,
[SEAL.] *Notary Public.*

66 We acknowledge ourselves bound as surety for the costs of the foregoing petition.

SHIELDS & MOUNTCASTLE.

Endorsed: American National Bank *et al. vs.* Carnegie Land Company *et al.* and Wilberforce Sully, trus., *et al. vs.* Carnegie Land Company *et al.* Petition of Mary P. Myton and A. B. Carhart. Filed Oct. 11th, 1895. C. W. Hodge, D. C. & M. Shields & Mountcastel, attorneys & solicitors, Morristown, Tenn.

67 *Order of Reference.*

JOHNSON CITY, TENNESSEE, *June 7th*, 1894.

In Chancery, at Johnson City, Tenn., June Term, 1894.

AMERICAN NATIONAL BANK ET AL. }
vs.
CARNEGIE LAND COMPANY ET AL. }

On application of complainants' solicitors, it is ordered, adjudged, and decreed that this cause be, and is hereby, referred to the clerk & master, who is ordered to hear proof and take and state and account and show—

I.

The amount of the personal assets belonging to defendant Carnegie Company which came to the hands of, or with due diligence ought to have come to the hands of, the assignee, J. W. Cure.

II.

The amount of such personal assets now under the jurisdiction of the court in this cause; and under these headings the master

will show the value of such personal assets and the nature and character thereof.

III.

The amount, nature, character, and value of the real assets which came to the hands of the said assignee and now under the jurisdiction of the court in this cause.

IV.

The names of each and all the *bona fide* creditors of the defendant Carnegie Land Company, together with the character and amount of their respective claims filed and proven in this cause.

V.

Who, if any, of said creditors have any legal or equitable liens upon any of the assets, real or personal, now under the jurisdiction of the court, and he will show the character and extent of
68 such liens.

VI.

And he will show who among the creditors are resident of the State of Tennessee and who are non-residents, and he will show who among said creditors are corporations and who are individuals, and under this heading he will show whether such corporation creditors are resident or non-resident of the State of Tennessee, and, if non-resident, whether the same shall have a situs in Tennessee and are carrying on business as such in Tennessee.

And this cause is left open for proof and filing of claims until the first day of October, 1894, at which time the master will close the account and proceed to make his report, and he will file the same herein by the 31st day of October, 1894.

All claims against defendant Carnegie Land Company may be filed herein by any creditor without further leave or proof and upon the execution of proper prosecution bond until the said 1st day of October, 1894, after which date no claims shall be filed without leave of court first had and obtained.

And any creditors desiring to take proof upon his or its claim may do so upon giving notice to the solicitors of complainant in the original bill or any one of them and to the solicitors of the Carnegie Land Company and of the assignee or any one of them, and the clerk and master of this court will give to complainant-' solicitors and to defendant company's solicitors notice of each and every claim hereafter filed in the cause, and such notice shall include the name and residence of the creditor and the amount of the claim.

And all claims filed in this cause shall stand although traversed and denied by answer, and any claim admitted to be correct by the defendant company or its solicitors shall stand as though
69 duly proven, though this shall not preclude any other creditor from contesting such admitted claim, and any creditor who claims a lien or any priority in filing his petition hereafter

shall furnish to complainants' solicitors and to the solicitors for defendant company and of the assignee and abstract of such petition.

And any creditor desiring to take proof and contest the claim of any other creditor shall give such other creditor or his solicitor notice thereof.

It is further ordered and decreed that J. W. Cure, assignee, shall within 30 days from this date make settlement with the clerk ans master of this court and show what assets, real and personal, came to and are now in his hands, and how he has administered his trust up to said date, and to this end the clerk and master will examine said Cure upon oath, giving notice to complainants' solicitors of such examination that they may be present and interrogate said Cure, if they so desire, and complainant- renew and insist upon their motion heretofore made for the appointment of a receiver in this cause, and give notice that on hearing of said motion they will rely upon the record at large in this cause and upon affidavits hereafter to be filed in this cause, and the record at large in the cause of P. Flemming & Co. *vs.* Carnegie Land Company, now pending in this court.

70 *Final Decree of July 3rd, 1896.*

JOHNSON CITY, TENN., FRIDAY, *July 3rd*, 1896.

THE AMERICAN NATIONAL BANK ET AL.
vs.
THE CARNEGIE LAND CO. ET AL. } Decree.

And consolidated causes therewith.

Be it remembered that this cause was further heard upon the entire record, including files in cases of Maden *et al. vs.* Carnegie Land Co. *et al.*, Frame King *vs.* Carnegie Land Co. *et al.*, P. Fleming & Co. *vs.* Carnegie Land Company *et al.*, all said causes lately pending in the chancery court at Johnson City, and upon the master's reports filed May 11th, 1896, and June 24th, 1896, and as to taxes, and upon the several exceptions to said reports and exceptions to proof offered. (On the hearing the chancellor declined to consider exceptions to proof, because of the great number made, until reduced to writing and filed over signature of counsel.)

Argument having been heard, and the questions presented by the pleadings in argument and by exceptions having been considered, it is found, adjudged, and decreed as follows, to wit:

I.

The Original Bill.

It is found and adjudged that the Carnegie Land Co. was a foreign corporation, doing business in Tennessee under the statutes fixing the terms upon which such corporations may do business in this State, and that its powers were limited thereby; that by its deed of

general assignment of June 3rd, 1893, it attempted, in violation of such statutes, to distribute its assets among all its creditors equally, making no preferences whatever, and thereby attempted to
71 defeat the preferences given by law to creditors residents of Tennessee over non-resident creditors and mortgagees whose mortgages were made subsequent to the creation of the debts due residents creditors, and that said deed is fraudulent in law and void.

It appears that this is alleged and challenged by the original bill in this cause and the distribution of the assets prayed to be made under the law granting preferences, and the bill having been treated as a bill to administer the assets of said corporation under the laws governing foreign corporations and nit under the assignment. The court finds and holds that the objections of want of sufficient averment are not well made. It is adjudged that the making of said deed was an act of insolvency by said Carnegie Land Company; that the bill in this cause was properly filed and sustained as a general creditors' bill and the injunction inhabiting suits against the Carnegie Land Co. touching the assets therein properly granted, and that the assets under the jurisdiction of this court are subject to distribution under the laws relating to foreign corporations doing business in Tennessee under proper decree in this cause.

II.

The Master's Reports.

It is ordered that the matters contained in the master's reports filed May 11th, 1896, June 24th, 1896, and as to taxes, be recommit-ed to him for a reinstatement thereof, and to the end that he classify and allow or reject the claims therein stated in accordance with the adjudications herein made.

The exceptions to said report are sustained and disallowed to correspond with the adjudications herein.

72 III.

Claim of A. R. Wing, Assignee, Intervenor.

1. The court is of opinion and decrees that, in so far as the decree of the U. S. circuit court at Knoxville for the northern division of the eastern district of Tennessee follows the allegation and prayer of Wing's cross-bill, filed Sept. 9th, 1895, in the case of J. P. Witherow & Co. *vs.* The Carnegie Iron Company and others, and impounds balances due the Carnegie Land Company on the mortgaged bonds of the Carnegie Iron Co. filed therein by pleadges of such bonds, that such decree is *res adjudicata*, the Carnegie Land Company being a party to the original cause and said U. S. circuit court having rightful jurisdiction over the said land company by the original bill and over the property impounded.

2. The court further finds and decrees that said U. S. circuit court did not have jurisdiction over the person of the Carnegie Land

Company, either by the original bill or cross-bill of Wing, with reference to and in so far as the assets here to be administered are concerned, and that all questions affecting the origin and validity of the claim of said A. R. Wing, assignee, and his right to recover on the same herein for the benefit of the creditors of the Carnegie Iron Company are, as here presented, for participation in the assets of the Carnegie Land Company *res integra* and subject to an examination as an original and unadjudicated claim.

The Carnegie Land Company previous thereto had assigned all its assets, whereby they became a trust fund and *has* brought under the jurisdiction of this court for distribution and all suits with respect thereto enjoined. The order to intervene in U. S. circuit court contained no authority to the intervenor to litigate or submit to decree of cross-action, and, his intervention being as representative appointed by the court to recover an alleged assets, no valid
73 decree, except for cost, could be rendered on plea of set-off. The intervenor owed nothing, and there was no authority to try questions as between the land company and iron company respecting assets under the jurisdiction of this court.

3. As an original, unadjudicated claim, the court finds and decrees that the alleged subscription by the land Co. to the capital stock of the iron company was made in the State of Virginia before the iron company had registered its charter in Tennessee, but, by the agreement and understanding of the parties was to be performed in Tennessee; that the iron company was originated, organized, and dominated by the land company to serve its ends, and that the contract and ownership of one corporation by another, as contemplated by said companies, was and is against the declared public policy of Tennessee; that said contract made in Virginia to be performed in Tennessee is governed by the laws of this State, and, being in contravention of law, cannot be sued or enforced in this proceeding.

Said petition of Wing is dismissed and he and his sureties for the prosecution thereof taxed with costs incident thereto.

4. In the matter of the contempt proceeding pending against Wing, the court finds and decrees that petitioners are not prejudiced by the decree complained of; that no objection was made at the time of its rendition; that the decree was in violation of the injunction pending in this case, the writ prayed for is disallowed, the petition dismissed, and petitioner and their sureties taxed with costs incident thereto.

5. On the several claims assigned to A. R. Wing, assignee, &c., it is adjudged that he is not entitled to recover herein for the benefit of the creditors of the Carnegie Iron Company, but said assignments appearing to have been made under orders in a cause
74 wherein the assignors were prosecuting claims on sureties given them by the land company, said assignors are held not prejudiced thereby and will be permitted to prove their claim herein and recover up to satisfaction.

IV.

Claims of A. B. Carhart on Mortgage Bonds.

The court is of opinion and finds and decrees that the proof sustains the allegations that Carhart is a *bona fide* holder of the bonds sued on pledged to him and Mrs. Myton by Wilberforce Sully, treasurer of defendant land company, and that the hypothecation of said bonds was not unlawful, and that A. B. Carhart is entitled to recover thereon, but subject to priorities fixed by law and as herein declared. It being suggested that the assignee's report show that A. B. Carhart owes the Carnegie Land Company a sum that should be set off against the sum due him, the master will inquire and report upon this matter.

V.

The Travellers' Insurance Company Note and Mortgage.

1. The court is of opinion and decree that the contract whereby the Travelers' Insurance Co., a foreign corporation, loaned its money to defendant land company and took mortgage security on the Carnegie hotel and property and lots mortgaged therewith was not illegal because of the statutes fixing the terms upon which foreign corporations may do business in this State, and that said insurance company, by said mortgage, acquired a valid lien upon the property therein conveyed, subordinate, however, to debts due residents of Tennessee contracted prior thereto, and the right of creditors with title retained, either in writing or by parol, in the personal property conveyed, and registered liens, if any there be, and specific liens of builders, furnishers, &c., made effectual
75 by suit or otherwise in the manner and time fixed by law.

2. It is further decreed that in the purchase of the property so mortgaged by the Travelers' Insurance Company at the sale by the master under former decrees herein it took the property so sold subject to such equities, liens, and titles retained, and that in settlement of the purchase price it can only apply as a credit on its debt such part as remains after discharging its proportion of the cost and expense of this suit and paying specific liens in full and its proportion of the then existing indebtedness of the land company due residents of Tennessee.

3. It is decreed that the P. Fleming & Co. judgment and the title retained by the Edgefield and Nashville Manufacturing Co. in furniture are payable, in the first instance, out of the property so sold; but if so elected by the insurance Co. it may have a reference to ascertain the relative value of the property in which title was retained to the price paid for the entire property, and the proceeds of the sale will only respond in the first instance to the claim of the Edgefield & Nashville Manufacturing Co. to the extent of the value so ascertained, and any remainder of the claim will be paid in its appropriate class.

VI.

King Preas and Boyd and Maden & Wife Claims.

These claims are disallowed as proper charges against the assets here to be distributed.

The rights of the parties are founded on obligations made and entered into after insolvency. The sum collected from Preas was on his new suretyship, and any right of Boyd as surety must be upon his last undertaking.

The assignee of Maden and wife must look to the new undertaking of the land company or show insolvency of the company and its sureties.

76 These petitions are dismissed and the respective petitioners and sureties will pay the costs incident thereto.

VII.

National Banks.

The court is of opinion and decrees that national banks located in Tennessee are not foreign corporations, but are residents of Tennessee, and entitled to priorities as such in the distribution of the assets of the defendant land company.

VIII.

Collaterals.

The court is of opinion and adjudges and decrees that the holders of the mortgage bonds of the Carnegie Iron Co. presented and proven in the case of J. P. Witherow & Company *vs.* The Carnegie Iron Company *et al.*, pending in the United States circuit court at Knoxville, are not prejudiced herein by failure to assign such collaterals to Wing, assignee, for the benefit of the creditors of the Carnegie Iron Company; that said two companies being insolvent, the claims may be proven against both insolvents, and *pro ratas* received up to satisfaction of their claims.

IX.

IX.

Marshalling Assets and Priorities.

The rights of creditors are adjudged as follows:

1. Taxes ascertained under the reference made after the sale under the statutes requiring such reference will be paid first, and so apportioned that the hotel and property mortgaged therewith will pay the taxes properly chargeable thereon, and the property mortgaged to secure bonds, the taxes properly chargeable thereon, without reference to the dates of the respective mortgages. Penalties allowed by statute and not an incident of the mode of

77 collection will be allowed.

2. Privilege taxes presented herein by petition will be ap-

portioned and paid as a debt due a resident of Tennessee, with respect to said mortgages, but as between the State of Tennessee and other creditors in the same class will be first paid.

3. The proper costs and charges of this suit not otherwise taxed, including proper fees to the solicitors filing the general creditors' bill and solicitors bringing suit under orders of this court in this cause, and proper costs, expenses, and counsel fees of John W. Cure, under order of this court or in proper efforts to protect assets, will next be paid, the property mortgaged to the insurance company (out of remainder, after deducting the P. Fleming & Co. claim and value of property in which title was retained by the Edgefield and Nashville Manufacturing Company) bearing its proportion, and the proceeds of the sale of the other property its proportion of such costs, fees, and expenses.

4th. All debts contracted prior to November 23rd, 1891, and due residents of Tennessee, will next be paid out of the remainder of both funds, being prorated so that each fund shall bear a like per centum of such indebtedness.

5th. The remainder of the proceeds of the Carnegie hotel and property mortgaged therewith will be credited on the mortgage indebtedness due the Travelers' Insurance Company.

6. All debts due residents of Tennessee contracted after November 23rd, 1891, and before Feb. 10, 1893, will be next paid out of the remainder of the proceeds of sale of property other than the hotel and property mortgaged to the insurance company—that is, out of proceeds of property mortgaged to secure mortgages bonds.

7. The holders of mortgage bonds under mortgage registered February 10th, 1893, will next be paid.

78 8. Creditors, residents of Tennessee, whose debts were contracted after Feb. 10th, 1893, will next be paid.

9. Creditors, non-residents of Tennessee, by simple contract, without reference to date of origin of their claims, will next be paid.

X.

Instructions to Master and Adjudications on Questions Presented by Claims Recommitted.

1. Usury.

Unlawful interest paid by the assignee after June 3, 1893, will be charged to claimants receiving the same and deducting from their claims, and further proof may be taken as hereinafter provided.

2. Claims contracted part before and part after the mortgage of November 23rd, 1891, and the mortgage of Feb. 10, 1893, are hereby opened until July 20th for further proof, and the master in his reinstatement will show what parts were contracted before Nov. 23rd, 1891, what parts after that date and before February 10, 1893, and what part after February 10, 1893, and the claim of Mrs. Laura Farr is opened to the end that proof may be taken as to when she furnished the money claimed, to whom furnished, and under contract with whom.

3*r*. In settling with Cure, assignee, the master will consider and

report such claims as were legitimate and proper expenses. For sums paid out after the bill in this case or debts contracted without orders herein the burden will be on the assignee to show that such expenses were proper and the estate benefited thereby.

4. Claims unexpected to will be put in their proper class by the master in restating his account.

5. The master will re-examine his report as to taxes and
79 the exceptions thereto, and any proof offered on or before July 20th, 1896, as to double assessment, want of title, tenantry in common payments, or other errors therein, and reform the same or make a new report as the facts may warrant, so as to report only such taxes as are legally due.

6. The master will report the probable costs of the cause, what would be proper compensation for solicitors in general creditors' bill, expenses, costs, and compensation of John W. Cure and solicitors suing under appointment of the court or for the assignee where such services benefited the estate.

7. He will commence hearing proof at his office in Johnson City on July 10, 1896, and continue from day to day until July 20th, 1896, and this order shall operate as a notice as to all parties of the taking of such proof, but witnesses examined in absence of opposing counsel may be recalled for cross-examination by such absent party; other proof will be upon notice.

8. It being suggested that several of the claims reported by the master are subject to set-off, the master will inquire and report upon such matters, but the party making such claims shall file with the master, before July 12th, a statement showing the claims subject to such alleged set-off, and such statement will be noted on the rule docket and operate as notice to all parties, and the master will hear proof and report thereon.

It appearing from statement of counsel in open court that petitioners R. W. & Laura Farr are temporarily in a distant State, it is ordered that if counsel for said petitioners desire to take the deposition of either or both said petitioners they may do so by filing interrogatories in the office of the clerk & master of this court for two days, viz., the 10th and 11th of July, 1896, to which
80 cross-interrogatories may be filed by any counsel desiring to cross same, but by consent Deadrick & Epps, solicitors for complainants in the original bill herein, will cross said interrogatories for all parties to the cause. A copy of such interrogatories will be furnished to Deadrick & Epps on or before July 10th, 1896, by counsel for said petitioners. After July 11th, 1896, said interrogatories and cross-interrogatories may be forwarded to said petitioners to be by them answered in proper form before some official legally authorized to take and certify depositions in the premises.

The Watauga Lighting & Power Company may take the deposition of E. H. Stevens under X (2), *supra*, and two days' notice of the filing of interrogatories to Carr & Reeves shall be sufficient, and cross-interrogatories may be filed within said two days by Travelers' Insurance Company and any other creditor.

Frame King and R. S. Boyd except to paragraph VI of the fore-

going decree disallowing their claims and the claims of Jas. H. Preas and dismissing their respective petitions, and prays an appeal therefrom to the next term of the supreme court to be held at Knoxville, Tenn., in September, 1896, and the same is disallowed at the present stage of this cause and until the coming of the further report of the master.

Endorsed: Decree. American National Bank *et al. vs.* Carnegie Land Company *et al.* Entered, record No. 3, page 351 to 360, inclusive, July 3rd, 1896.

81 *Final Decree.*

AMERICAN NATIONAL BANK ET AL. *vs.* CARNEGIE LAND COMPANY ET AL. } In Chancery, at Johnson City, Tenn.

And consolidated causes.

Final decree.

Be it remembered that this cause came on to be further and finally heard before Chancellor Smith on this Sept. 3rd, 1896, upon the record at large and upon the record in the cause of Carnegie Land Company *vs.* H. C. Jarvis *et al.*, and Jno. W. Cure, trustee, *vs.* Carnegie Land Company, and especially upon the reformed report of the clerk and master, filed in the cause on August 22nd, 1896, and the several exceptions filed thereto, and the former orders and decrees; which said reformed report is in the words and figures as follows, to wit:

(Omitted in printing.)

82 Thereupon, after argument of the exceptions, the court adjudged and decreed as follows:

I.

Upon the exceptions No. III, subsection 3, of A. R. Wing, assignees, etc., and numbers four and five of complainants Carhart and Sully, trustee, and number 2 of Travellers' Insurance Company, the court is pleased to and does modify said report of the master, section IV, subsection 2, page 8, so that the clients of Messrs. Deaderick & Epps and Reeves and Baxter, resident creditors of Tennessee, shall out of the sums received by them pay 12½ per cent. on amounts received by them, and such sum shall be credited on the fees allowed said solicitors by the master in said report, and the remainder will be paid out of the general fund in this cause.

II.

The exception of Carhart and Sully, trustee, # 6, is by consent of parties sustained in this far: the master's report, section four, subsection 3, is modified so as to show allowance of fees to Carr & Reeves and Reeves and Baxter and Deaderick & Epps, solicitors,

intervening in the Federal court under orders in this cause, the sum of seven hundred fifty dollars instead of $1,000.00, as reported by the master.

III.

Upon exception # 7 of Carhart and Sully, trustee, and # 2 of original complainants, and # 4 of Travellers' Insurance Company, the several parties and petitioners to the cause and Jno. W. Cure, assignee, agree that the said Cure, assignee, should be paid out of some fund in the cause as proper compensation for his services as such the sum of $2,550.00, the same to be credited with the sum of $2,100.00, being the amount heretofore retained by the said
83 Cure upon his compensation, it being agreed that there shall be no further contest over the amount of said compensation, his expenses to be as shown by the master's report of Aug. 27th, 1896, filed as of date Aug. 22nd, 1896, being report of settlement with the assignee.

But the right is hereby reserved to the Travellers' Insurance Company as to whether any of said compensation or expenses shall be paid out of the funds arising from the sale of the Carnegie Hotel property.

IV.

Upon exception of Travellers' Insurance Company # 5 to section VI, subsection B. 8, of said report, wherein Kirkpatrick and Williams are allowed priority on a portion of their claim against Carnegie Land Company, the court decrees that said item be modified as follows: As against the Travellers' Insurance Company said Kirkpatrick and Williams should be allowed under said item the sum of $1,333.31 as the principal sum, together with interest thereon from June 3rd, 1893, to Aug. 10, 1896, being the sum of $254,87, making in the aggregate the sum of $1,588.18 instead of the sum of $2,481.59, as reported by the master in said report.

But said aggregate of $1,588.18 as to said insurance company should be reduced by the sum of $238.00, being the proportion of proceeds of lien lots, leaving the sum of $1,350.18 reportable in the first class of Tennessee creditors instead of $2,172.65, as now shown by said report, but the amount of said abatement will be allowed as a Tennessee claim under section VIII of said report, as hereinafter shown. The modifications as to the claim of Kirkpatrick & Williams for fees as solicitors of Carnegie Land Company are based upon the oral testimony of S. J. Kirkpatrick, given in open court by consent, with respect to which no exceptions was or is taken.

84 V.

Upon the exception of Travellers' Insurance Company # 11 said report of the master in section VI, B. 6, in relation to Johnson City Foundry and Machine Works, the court decrees a modification as follows as against the Travellers' Insurance Company: The sum of $— should be deducted from $800.00 as reported as the principal allowable, for the reason that the proof fails to show said portion

of the indebtedness, to wit, $—, was assumed by or became a debt of the Carnegie Land Company prior to Nov. 23rd, 1891, but said sum of $— should be reported and allowed under section VIII of said report, second class of Tennessee creditors.

VI.

As to the claims reported in the name of A. R. Wing, assignee, to wit, section VI, B. 12, 13, & 14, and claims section VIII, 11 and 12, viz., J. C. Cullen, Edgefield and Nashville Mfg. Company, First National Bank of Chattanooga, H. S. Chamberlain, and Jonesboro Banking & Trust Company, the court decrees that said report be modified so as to show all of said claims to be payable to and to stand in the name of said assignors respectively instead of in the *the* name of said Wing, assignee, for the benefit of the creditors of the Carnegie Iron Company.

VII.

As to section VIII, subsection 7, in relation to the claim of Kirkpatrick and Williams, the chancellor decrees that said item of report be modified as follows: Part of debt due by account, $2,083.35, together with interest from June 3rd, 1893, to Aug. 10, 1896, $397.91, making in all the sum of $2,481.26 instead of $537.25, less $136.86, being part of proceeds of lien lots; but the chancellor further decrees that any portion of said claim of Kirkpatrick & Williams that may remain unpaid after they shall have re-
85 ceived their *pro rata* in the 1st, 2nd, and 3rd class of Tennessee creditors, they may have resort to the special fund arising from the sale of lien lots, set out in said report, upon condition that no greater sum than $238.00 as against the Travellers' Insurance Company shall be taken by said Kirkpatrick and Williams from the amount shown in section IV of this decree, and upon the further condition that said Kirkpatrick and Williams shall not be paid any sum or sums in excess of their entire recovery herein.

VIII.

Upon the exception to section "X," subsection 11 (3), of said report, being exception 1 of J. I. Cox, receiver, the court decrees that inasmuch as on the claim or claims of said Cox, receiver, the sum of $218.00 is usurious interest exacted from the assignee in this case pending this litigation out of the funds in this case without the consent of this court, and said Cox declining to submit to a decree therefor or to refund said amount by way of set-off, it is decreed that no part of the $430.00 note shall be collectable herein until said usurious interest of $218.00 so wrongfully exacted is refunded by said receiver and his claim purged to the extent of said usury.

IX.

It is further ordered, adjudged, and decreed by the court that all other exceptions to said report and the above exceptions, except as herein modified or sustained, are overruled and disallowed and said

report is hereby in all things confirmed except as herein modified and changed by this decree.

X.

And the clerk and master of this court is hereby directed to pay out of any funds now in his hands or which may hereafter come into his hands in this cause and make distribution thereof to
86 the respective parties entitled thereto under this decree and in accordance with the terms and conditions hereof and as herein directed.

XI.

The solicitors of record of the several complainants and petitioners herein recovering are awarded liens on the recoveries of their respective clients to secure them the payment of their reasonable fees for services performed in this cause.

XII.

And by consent, in the event of an appeal, the clerk and master is allowed to retain from the funds in his hands upon his compensation and costs in the cause the sum of $1,250.00, and H. H. Carr is allowed to borrow $1,000.00 or any part thereof as reported by the master to H. H. Carr or to Carr and Reeves upon executing a proper refunding bond for the same, with good and solvent security, and the $750.00 reported and hereinbefore decreed to Carr & Reeves and Deaderick & Epps and Reeves and Baxter for their services in the Federal court, and the fee of $2,000.00 to Kirkpatrick, Williams and Bowman as solicitors for the assignee or the balance due thereon after deducting the amount heretofore paid them by said assignee, and the balance due J. W. Cure as assignee, as shown by this decree hereinbefore, may be paid to said parties respectively by the clerk and master at once, notwithstanding any appeal that may be taken in these causes, the same having been agreed to in this cause. Complainants' counsel, Reeves and Baxter and Deaderick & Epps, may each borrow upon their own refunding bond, each of said firms, the sum of $1,500.00 without security, to be charg-able against any sum that may be finally allowed them as solicitors for the general creditors in the original bill.

87 It is further agreed that G. T. Lee, Thad A. Cox, Jno. I. Cox, and W. W. Faw may borrow out of funds in this case, upon execution of regular refunding bond, such fees as the master has reported in their favor or allowed them by law out of taxes reported or out of sums reported in favor of W. H. Floyd and Johnson City F. & M. Works and allowed by this decree.

XIII.

In the event an appeal is taken from this decree, each party appealing will execute an appeal bond in the sum of $750.00.

Complainant A. S. Carhart and Wilberforce Sully, trustee, appeal to the next term of the supreme court, to be held at Knoxville on the second Monday in Sept., 1896, from the following parts of the

foregoing decree and preceding decrees and from the decrees sustaining the original bill and ordering it to operate as such: From the decrees allowing ad valorem State and county taxes which accrued subsequent to the making and registration of complainant Carhart's mortgage, priority to the lien of said mortgage and overruling of said Carhart's exception to the report as to taxes in that respect; from the decree heretofore entered and the present decree in so far as the court overrules said Carhart's exceptions to the claim of the American national bank as a claim prior to that of said Carhart mortgage; from that part of the foregoing decree allowing general creditors' fees at the sum fixed and from holding said fee payable out of the entire funds in the cause instead of payable out of the funds going to general creditors, and the decree ordering the costs, counsel's fees, and assignee's compensation and counsel's fees payable out of the entire funds, thus onerating the mortgage fund and ex*h*onerating the funds going to general creditors; also their part of said decrees allowing interest, counsel fees, and protest
88 fees which *was* incurred upon the debts going to Tennessee creditors subsequent to the making and registration of complainant Carhart's mortgage, priority over the lien of said mortgage, and thereby overruling said Carhart's exceptions to the above report of the master to that effect, and from that part of the present decree and former decree ex*h*onerating the Travellers' Insurance Company from the entire payment of the Edgefield and Nashville Mfg. Co. to the full extent thereof, assuming by it under the terms of the decree of sale and overruling complainant Carhart's exceptions thereto; which said appeal is granted upon the said Sully and Carhart executing a bond for cost for their said appeal in the sum of $750.00, which is done.

And A. R. Wing, assignee and receiver of the Carnegie Iron Company, as petitioner and as assignee of the claims of Edgefield and Nashville Mfg. Company, First National Bank of Chattanooga, J. C. Cullen, H. S. Chamberlain and Jonesboro Banking & Trust Company and petitioner thereon and Wilberforce Sully, Wm. E. Maden and wife, petitioners, come and except to the above and former decrees and orders of this term of court, and to all former orders and decrees entered in the cause, and to the action of the court on the various exceptions preserved in the bill of exceptions (including the order sustaining the original bill herein as a general creditors' bill), and they and each of them pray an appeal to the next term of the supreme court of Knoxville, to be held at Knoxville on the second Monday of September, 1896, which appeal the court is pleased to and does grant a bond for cost of appeal in the sum of $750.00, to be executed by each of said appellants. Said bonds are accordingly filed.

And Frame King and R. S. Boyd except to the former decree sustaining exceptions to the allowance of the claims presented by their petitions and dismissing their petitions, and also to the
89 foregoing decree overruling their exceptions to the report of the master of Aug. 22nd, 1896, and pray an appeal to the next term of the supreme court, to be held at Knoxville, Tenn., on

the second Monday of Sept., 1896, which is granted by the court upon their executing bond in the sum of $750.00 each, and said bonds have this day been filed.

To the foregoing decree and all other orders and decrees heretofore entered in this cause Travellers' Insurance Company excepts and prays an appeal to the next term of the supreme court, to be held at Knoxville, Tennessee, beginning the second Monday of September, 1896, which said appeal is granted, appellants having tendered herewith bond and security as required by law and in the sum fixed by the chancellor; which said bond is hereby accepted.

And petitioner Jno. I. Cox, receiver of First National Bank of Johnson City, Tenn., excepts to the findings and adjudication of the court in paragraph VIII of the foregoing decrees, wherein the court refuses to allow a recovery against Carnegie Land Company in favor of said petitioners unless said petitioner will submit to an offset of $218.30 for usurious interest paid the First national bank by J. W. Cure, assignee, and said petitioner prays an appeal therefrom to the next term of the supreme court of Tennessee, at Knoxville, Tenn., which is granted upon said Cox, receiver, executing proper appeal bond as provided hereinbefore.

Complainants, American National Bank *et al.*, except to the foregoing decree in overruling this exception # — to the master's reformed report, in which he allows as a *bona fide* debt the claim of A. B. Carhart as purchaser of 85 mortgage bonds of the Carnegie Land Company; also to item 5, sec. 3, of the decree of July 3rd, 1896, in so far as the same allows assignors to recover herein up to satisfaction without first accounting for their recoveries in
90 the Federal court upon collaterals given them by the Carnegie Land Company as security for their respective debts; also to sec. 4 of said decree, in holding that said A. B. Carhart is a *bona fide* holder of the bonds sued on and pledged to himself and Mrs. Myton by Wilberforce Sully, treasurer of the Carnegie Land Company, and decreeing in favor of said Carhart as the purchaser of said bonds at the pledgee's sale.

Also to item 3, sec. 5, in allowing the Edgefield and Nashville Mfg. Company to share primarily in the proceeds of the sale of the hotel furniture, and without first accounting for the amount realized from the sale of collateral held by it in said Federal Court proceeding.

And complainants pray an appeal from said decrees to the next term of the supreme court, to be held at Knoxville, Tenn., on the 2nd Monday in Sept., 1896, which is allowed upon said complainants executing an appeal bond as herein provided.

And by consent of parties C. H. Jennings is allowed to borrow out of the fund such fees allowed upon taxes due the corporation of Johnson City, and also the sum of $50.00 of the fees allowed Messrs. Carr & Reeves for services rendered in the case of R. L. King *vs.* Carnegie Land Company (said Jennings being a member of the firm of Carr, Reaves & Jennings at the time the said services were rendered), upon executing a refunding bond with solvent security.

And by consent of parties Ace Hardin is allowed to borrow out

of the fund the sum of $155.78 upon his executing a refunding bond with solvent security.

91 Filed Sept. 11, 1897.

J. G. STUART, *D. C.*

AMERICAN NATIONAL BANK ET ALS. vs. THE CARNEGIE LAND CO. ET ALS. } Washington County. Equity.

Opinion.

The original bill in this cause was filed Nov. 27, 1893, by the American National Bank, a banking corporation under the banking laws of Congress, doing business at Nashville, Tennessee; Shields Bros., of Knoxville, Tennessee, and the Scioto Star Fire Brick Works, a corporation of Ohio, against The Carnegie Land Co., a corporation chartered in the State of Virginia, but domesticated in Tennessee, and having a *situs* and property and business in Washington county, this State; John W. Cure, its assignee under a general assignment, and certain of its creditors. The bill was filed as a general creditors' bill in behalf of complainants and all other creditors of said company who desired to come in and be made parties for the purpose of establishing their claims.

It averred, among other matters not essential to be stated here, that the defendant corporation was insolvent; that it had made an assignment of all its assets of every description to Cure, which was a positive act of insolvency; that it had ceased to do business; that Cure was taking no steps to wind up the trust; that the assignment provided for the payment of all creditors equally, ignoring the statutes of this State, giving resident creditors a preference in
92 payment over non-resident creditors of such corporations, which made it fraudulent in law and in fact, and that Cure, who was its secretary, in conjunction with the company, was holding the assignment as a means of hindering and delaying creditors. The bill sets forth many detail- as to the condition of the company, its properties and indebtedness, showing its insolvency and the improper conduct of Cure from the standpoint of the interest of creditors.

It prayed that all creditors of the land Co. be required to prosecute their claims in this suit by becoming parties by petition; that the master give notice of the suit to creditors; that all other suits be enjoined and a receiver be appointed to take charge of all of the property of the company, and be ordered to collect its notes, etc., and convert its property into money as soon as practicable; that complainants have a decree for their respective debts sued on and set out in the bill, and that the master take and state an account showing:

1st. The assets of the company.

2nd. The names of the preferred creditors, if any, and the amount due each, and the particular property on which each of such

creditors has a lien or equity, and the resident and non-resident creditors.

3rd. The general creditors and the sum due each.

4th. The probable cost and expenses of this suit, including the compensation of the receiver and a reasonable fee for the solicitors of the complainants in this cause.

5th. The *pro rata* of the general creditors.

The bill asks that the property of the company be sold on a credit of six months in bar of the equity of redemption, and that the court by proper orders and decree settle all questions of priority among creditors, and for general relief.

93 John W. Cure, assignee, filed a demurrer to the bill, accompanied by an answer.

We need not here notice the grounds of his demurrer, five in number, nor recite in full even the substance of his answer, which is quite lengthy. It is sufficient to say that it denies, either specifically or in a general way, many of the detailed charges in the bill, and, while admitting the general assignment to him by the company, denies that it was an act of insolvency, and all imputations that he had failed to do his full duty as assignee, or anything to cause his removal and the appointment of a receiver to take the property from under the trust of the assignment. He also denies the indebtedness of the company to be as great as averred in the bill, or that the assets were overvalued in the assignment of the company or in the schedule of the assets attached thereto.

As to the right of resident creditors to priority of payment, he says, in view of the general assignment law of the State, all the company could do was to follow it, and to leave the assignee to administer his trust according to law. He denies the right of the Scioto Star Fire Brick Works to maintain a suit on its claim, because it arose under a contract made between Dec. 1, 1891, and Jan. 30, 1892, and that, being a foreign corporation, it had not complied with the law of this State in respect to filing its charter, etc.

He also says that the complainant bank held six bonds of the Carnegie Iron Co. to secure its claim, and should be made to produce them or account for them at their par value.

As to the item of $300,000 of first-mortgage bonds charged as an indebtedness of the company in the bill, he avers that the company still has the bonds, and that they are neither an asset nor a liability.

94 His answer contains many other denials and explanations of charges or matters stated in the bill.

The land Co. adopted the answer of Cure.

It is practically impossible to state within the proper limits of even a very lengthy opinion all the facts, pleadings, decrees, and reports appearing in this many-sided litigation and in the six large volumes constituting the record of the cause, nor do we deem it essential to a proper determination of the questions before us. We will endeavor to incorporate in this opinion sufficient facts appearing in the record to present the questions before us.

The chancellor, Dec. 4, 1893, sustained the bill as a general cred-

itors' bill and ordered the master to notify all creditors to come in by petition, giving bond, and establish their claims in this suit. All other suits against the company were enjoined. He held in abeyance the motion to appoint a receiver.

Cure, assignee, excepted to the order of the court sustaining the bill as a general creditors' bill.

We need only say here that a large number of creditors of the land Co, first and last, intervened by petition and became parties, the time for so doing having been several times extended by the chancellor, and several, it seems, filed separate bills; which were by order of the court consolidated with this one.

At the June term, 1894, of the court below the cause was referred to the master, and he was directed to report:

1st. The personal assets of the land Co. in the hands of Cure, assignee, or that should be.

2nd. The personal assets now in the jurisdiction of the court and their character and value.

95 3rd. The real estate of the company in the hands of Cure in the jurisdiction of the court, and its value.

4th. The names of the creditors and the nature and amount of their several debts filed and proven in the cause.

5th. Creditors having liens on any of the assets of the company now under the jurisdiction of the court, and the nature and extent of such liens.

6th. The resident and non-resident creditors, whether individual or corporations, and of the latter which ones have a *situs* and are doing business in this State.

Proof was to close under this order by Oct. 1, 1894, and the master to file his report by the 31st of the same month.

Cure, assignee, was ordered within 30 days to make a settlement with the master, showing the assets in his hands and what he had done under the trust, and to submit to an examination under oath by the master, of which counsel of complainants were to have notice.

Cure, assignee, in his report under this order, states as among the assets $300,000 first-mortgage bonds in the hands of Wilberforce Sully, treasurer of the company, at # 80 Broadway, New York, and $100,000 of the mortgage bonds of the Carnegie Iron Co. held by various parties as collaterals.

We need not notice here petitions filed by Cure, assignee, for instructions and the answers thereto by complainants, and perhaps others. It may be said, however, that motions were kept up for his removal and the appointment of a receiver.

At the December term, 1894, the master not having filed the report ordered, the order was revived, and he was directed to make and file the report by April 1st following

96 March 2, 1895, the American National Bank and the Scioto Star Fire Brick Works filed a petition, or what may be treated as such or as an amended and supplemental bill, in the case. Its main purpose was to have disinterested counsel appointed by the court to look after a large claim of the land Co. against the

Carnegie Iron Co., which was in the hands of a receiver appointed by the Federal court at Knoxville, Tennessee, and being wound up as an insolvent concern, and to have a receiver of the land Co. appointed or to have an order on Cure to turn over enough assets to pay taxes on the real estate of the company, to collect which proceedings were pending.

Cure in his answer or pleading to this petition, among other things, states that the Carnegie Iron Co. claims that the land Co. was indebted to it by way of subscription to its capital stock, and that it was for the court to determine whether the land Co. should initiate the contest to collect its claim against the iron Co., in view of the claim of the latter company, by intervening in the Federal Court case against the latter, and that he had left the matter to his attorneys, Messrs. Carr & Reeves, being advised by them that there was no need to hurry in the matter.

May 29, 1895, Wilberforce Sully and A. B. Carhart, of New York, filed a bill against the Carnegie Land Co., the Travellers' Insurance Co. of Hartford, Connecticut, and the Connecticut Trust & Safety Deposit Co. of Connecticut. Its object was to recover in favor of Carhart on $85,000 first-mortgage bonds of the land Co., alleged to have been sold to Carhart and which it was averred he held as an innocent purchaser, and to have the recovery declared a prior lien over all other creditors on all the property of the land Co. This bill alleged that the bonds were due by virtue of default in performing the conditions thereof and the mortgage
97 securing them.

The American National Bank and other creditors were by order of the court permitted to become parties defendant to this bill and defend against its claim, and these parties and the Travellers' Ins. Co. did answer it, in which they vigorously denied its contentions. The substance of their answers is that the bonds sued on had never been legally issued by the land Co.; that Carhart was not an innocent purchaser or holder; that the arrangement by which they were turned over to Carhart, if in fact they had been delivered to him, was without the knowledge or assent of the land Co., and that the transaction was a conspiracy and fraud to defraud the honest creditors of the company.

June 8, 1895, the Sully bill and case was consolidated with this.

The master, June 13, 1895, in response to the order of reference, filed an elaborate report which covers 29 pages of the record in typewriting. We need not go into it at any great detail here. He reports the $300,000 of mortgage bonds of the land Co. as being neither an asset nor a liability. This was obviously based upon the assumption derived from the schedule filed with its assignment and the testimony of Cure, that these bonds had never been negotiated, and that they were still in the possession or treasury of the company. He reported as an asset $100,000 of mortgage bonds of the Carnegie Iron Co., but that they were held as collaterals by various parties whom he named, and that Mary P. Myton bought in 11 of them held by her at 22½ cents on the dollar. He sets out various articles of personalty and the notes, etc., of the company,

which, after deducting a certain amount entering into the accounts of the assignee, he reports as footing up the sum of $166,150.27. He reports the real estate as valued at $279,053.25. He re-
98 ports debts amounting to $481,773.89. The debt of the American national bank is reported at $4,652.45, and that of the Travellers' Ins. Co. at $33,821.20, and that the latter is secured by a mortgage on the Hotel Carnegie, its furnishings, and a designated number of lots in Carnegie addition to Johnson City.

The chancellor acted upon this report as being in the consolidated causes, June 29, 1895. He decreed that it was necessary to sell the real estate of the land Co. to pay its debts appearing in the record, and the master was directed to sell the same upon the terms specified in his decree. He reserved all questions as to the validity and the amount of claims and as to priorities for future adjudication. He left the cause open for 90 days for the filing and proving of claims. By consent, the question of proceeding on notes, etc., reported in the hands of Cure, assignee, by the master, was also reserved for future adjudication, but Cure was ordered to turn them over to the master, with all the other personal assets in his hands, and the master was directed to sell the personalty, except the notes, when he sold the real estate, and to keep a separate account of the proceeds. He was directed to pay taxes out of the proceeds of the properties against which they were assessed.

The chancellor, Aug. 22, 1895, consenting to the petition of compl'ts then filed, decreed that counsel of complainants, in connection with Messrs. Carr & Reeves, who had been retained by Cure, assignee, should at once by petition intervene in the case in the Federal court at Knoxville, in which the Carnegie Iron Co. was being wound up under a general creditors' proceeding, and set up there the claim or claims of the land Co. against the iron Co., and to this end they were authorized to use the name of the assignee or the receiver appointed in this case.

99 August 26, 1895, the Edgefield & Nashville Mfg. Co. filed its petition in the original cause and asked to be permitted to become a party and to recover on and collect its debt evidenced by three notes endorsed by Gen. J. T. Wilder. Its insistence was that it had sold a lot of furniture, etc., to the Carnegie Land Co., retaining the title thereto under a written contract of date Sept. 15, 1891, and that it had a superior lien to secure its claim by virtue of its written contract retaining title. It states that eight bonds of the Carnegie Iron Co. had been delivered to it as collateral to secure its debt, but that it, by accepting these collaterals, did not release its lien or claim on the property sold contained in its reservation of title thereto until all the purchase price was paid.

Dec. 2, 1895, the chancellor, by consent of parties, ordered and decreed a sale of the personal and real properties of the land Co. He fixed a minimum upon the separate properties—that is, upon the personalty and realty. We set out the portion of his decree relating to the sale of the Carnegie Hotel property. It is as follows: "For the Carnegie Hotel property, real and personal, he will not report a sale unless the bid therefor should amount to $25,000, and

said property may be sold as a whole, both real and personal. For the farming lands the master will not receive nor report any bid of less than $3,000. The intention of this decree is to sell only such interest and equities as the land Co. has in and to said property, and purchasers at the sale will take only such interest as said defendant has and subject to all equities existing against said defendant."

At the sale made by the master Dec. 2, 1895, Wilberforce Sully became the purchaser of the real estate at the price of $25,000, and of the personalty, except the claim filed against the Carnegie Iron Co. in the Federal court, and the bonds of that company and the furniture in the Carnegie hotel at the price of $6,500.00, and complied with the terms of the sale.

The master reported that he offered the Carnegie hotel and the lots connected with it, as designated in the record, and the furniture in the hotel, as a whole, when the Travellers' Ins. Co., through its agent and attorney, became the purchaser, at the price of $25,000.00, and says in his report, "No cash was paid into the office of the master nor note given, the said purchaser proposing to credit its debt, secured by deed of trust on said hotel property and furniture, with the amount of its said bid, and it being represented that such mode of settlement, it was understood, would be or was agreed to by counsel of the various parties interested in the cause, the master reports such sale to the court for such approval by counsel and confirmation by the court."

The decree of the court confirming the sale to the Travellers' Ins. Co. of the hotel, etc., is as follows:

"It further appearing from said report that at said sale the real estate known and described in the record as the Carnegie Hotel property, together with all the personalty in said building, was sold to the Travellers' Insurance Company of Hartford, Connecticut, at the price of $25,000, and for reasons stated by the master no note was given for said purchase-money, and it appearing to the court that no adjudication has as yet been made in the cause declaring said purchaser's lien or fixing the amount of the recovery to which it is entitled herein, the master will not credit said bid or the amount thereof on the claim of said purchaser until the further order of the court herein, and in any event the said purchaser will be required to pay into court a sum in cash sufficient to pay the costs of said sale, and notice thereof, incident to said property, and said sale is hereby confirmed, and it is ordered, adjudged, and decreed that all the right, title, claim, and interest that the Carnegie Land Co. and all the parties to this cause have in and to said property, real and personal, be, and the same is hereby, divested out of it and them and vested in said purchaser, the Travellers' Insurance Company, in fee, and a lien is hereby expressly retained upon said property to secure the full amount of the purchase price therefor."

The cause was again ordered opened for proof of claims until Jan. 20, 1896, at which time the master was ordered to close the account, and to report to the next term thereafter, regular or special. He

was also directed to readvertise and sell the lands which had not been sold at his prior sale, and the *minimum* thereon was removed.

Jan. 4, 1896, the Travellers' Insurance Co. filed another petition in the cause. The purpose of this petition was to bring the Connecticut Trust & Safety Deposit Co. before the court as the trustee in the deed of trust on the hotel property so as to perfect its title as the purchaser at the master's sale, and to ascertain its rights under the decree of P. Flemming & Co. against said property, and which decree had been assigned to it, and the assignment confirmed by the court, and to have the court order its bid of $25,000 to be placed as a credit upon its note against the Carnegie Land Co., and to order that it stand as a Tennessee creditor as to the Flemming & Co. decree satisfied by it.

A. R. Wing, assignee and receiver of the Carnegie Iron Co. under the appointment of the Federal court at Knoxville, filed his petition in the cause February 17, 1896. The substance of the averments of this petition is that he was assignee of the Carnegie Iron Co.; that one Witherow and others had filed a bill against the iron Co. and others in the Federal court at Knoxville; that he had answered and filed a cross-bill; that his cross-bill was
102 sustained by that court as a general creditors' bill; that all creditors of the iron Co. were required to file and establish their claims in said cause in said court; that accordingly the Carnegie Land Co. and its assignee, John W. Cure, filed their petition in said cause in said court asking to become a party thereto, and to set up a claim of the land Co. against the iron Co. for $100,000, by way of its first-mortgage bonds issued by the iron Co., subject to the rights of the collateral pledgees of the land Co., and for the further sum of $58,000, with interest alleged to have been loaned to the iron Co; that this petition was defended against by answer and affirmative relief sought by a cross-bill, and the claim set up that the land Co. was indebted to the iron Co. by way of subscription to the capital stock of the latter in the sum of $249,500.00; that this matter was contested, and that it resulted finally in a decree in that court in favor of the iron Co., after allowing all credits, for the sum of $129,275, and the petitioner was ordered by the Federal court to intervene in this cause in this court to ask an allowance and payment of said sum out of the assets of the land Co. being administered in this court under this cause.

It is needless to say that the claim of Wing, assignee of the iron Co., was vigorously resisted by the other creditors of the land Co.

The master on March 3, 1896, made an elaborate report on the various properties embraced in the possessions of the land Co.

Exceptions thereto were filed, but we need not notice the matter further at this time.

May 11, 1896, the master filed a supplementary report under the decrees of the court of June 29 and Dec. 9, 1895, respectively, of the assets and liabilities of the company. This report covers
103 about 44 pages of the record, and will be found in volume 3, from page 888 to 933. Its recapitulation shows an indebtedness on the part of the land Co. of $161,137.43, and assets amounting

to $58,246.56, making the deficiency of assets $102,890.87. This deficiency, the master reports, will be increased by the taxes previously reported by him, and the expenses of this litigation.

Complainants in the original bill, Carr & Reeves, H. C. Jarvis, The Travellers' Ins. Co., A. B. Carhart, The Edgefield & Nashville Mfg. Co., King & Boyd, The *the* Jonesboro Banking & Trust Co., A. R. Wing, assignee and receiver, and The Wautauga Light & Power Co., all filed exceptions to this report. Their exceptions will be found in volume 5 of the record from page 1389 to 1439. We will not recite these exceptions here, but will notice them hereafter, so far as they may be involved in the assignments of errors before us on appeal from the decree of the chancellor.

June 6, 1896, the chancellor acted on a motion to allow Wing, assignee and receiver, further time to adduce proof, and the result of the order of the chancellor was to permit him to renew his motion upon making a certain character of affidavit, or an affidavit containing averments deemed appropriate by the court as ground for entering the motion.

The master made another supplementary report June 24, 1896. It covers five pages of the record, and will be found in volume # 5, from page 1568 to 1583. This report, in effect, allows the claim of Wing, assignee and receiver, amounting, with interest, to the sum of $130,328.72. It also allows a claim in favor of Wilberforce Sully, assigned by W. E. Maden and wife, amounting to $795.10, and this debt he reports was created prior to Nov. 1, 1891. He also reports a claim in favor of Weihl, Provasco & Co., a banking firm under the name of the Bank of Chattanooga, to the amount of
104 $348.45. This claim was presented by petition, it seems, since his former report.

Wing, assignee; A. B. Carhart, the Travellers' Ins. Co., and the Wautauga Light & Power Co. filed exceptions to this supplementary report.

The chancellor July 3, 1896, further heard the cause upon the record, embracing all the -onsolidated causes, the master's reports filed May 11 and June 24, 1896, and the various exceptions thereto, as well as exceptions to evidence offered. The exceptions to evidence made at the hearing he declined to hear, because of their great number, until reduced to writing and filed over the signature of counsel. The decree of the chancellor is of necessity, by virtue of its appropriate formal phraseology adapting it to the numerous claims and contentions made, of considerable length. It will be found in vol. 5 of the record, from page 1629 to 1638.

Eliminating all its merely formal parts, he held and decreed as follows:

That the Carnegie Land Co. was a foreign corporation under the statutes of this State fixing the terms upon which such corporations may do business here, and that its general assignment of June 3, 1893, provided for the payment of all its creditors equally, thereby ignoring and attempting to defeat the preference given by statute to resident creditors, and that this rendered the deed of assignment fraudulent in law and void. This resulted in decreeing

that resident creditors claiming under the provisions of the statute giving a preference were first entitled to payment, and the objection that the bill in its averments was not sufficient to raise the question was overruled. He also held that the making of the assignment by the land Co. was an act of insolvency on its part. He ordered that the matters in the master's report of May 11 and June 24, 1896, and as to taxes, be recommitted to him
105 for a restatement, to the end that he classify and allow or reject claims therein stated in accordance with the holdings of his decree, and exceptions to his said report were sustained and overruled to correspond with his adjudications in his decree. With respect to the claim of A. R. Wing, assignee, he held that the decree of the Federal court at Knoxville, in so far as it followed the allegations and prayer of Wing's cross-bill filed Sept. 9, 1895, in the case of J. P. Witherow & Co. *vs.* The Carnegie Iron Co. *et al.*, and impounded balances due the Carnegie Land Co. on the mortgage bonds — the Carnegie Iron Co. filed in that case by pledgees of the bonds, was *res adjudicata*, because the land Co. was a party to the original cause; that the court had jurisdiction over it by the original bill and over the property impounded. He held, however, that the Federal court did not have jurisdiction over the person of the land Co., either under the original bill filed therein by Witherow & Co. or the cross-bill of Wing, assignee, filed in that case, in so far as the assets of the land Co. in his court to be administered were concerned, and that all questions as to the origin and validity of the claim of Wing, assignee, and his right to recover thereon in this case for the benefit of the creditors of the Carnegie Iron Co. and to participate in the assets of the land Co. before his court for administration were *res integra* and subject to examination as an original and unadjudicated claim.

This holding on the part of his honor seems to be predicated upon the theory that the land Co., previous to that suit in the Federal court, had assigned all its assets, and that they had been brought under the jurisdiction of his court, to be administered as a trust, and all other suits with respect thereto enjoined, and that the order made by his court for an intervention in the Federal court to set up a claim of the land Co. against the Carnegie Iron Co.
106 contained no authority to his intervenor to litigate or submit to a decree against his contention and a recovery over under a cross-bill. The intervenor from his court, says his honor, acting as a representative appointed by the court to recover an alleged asset, that no valid decree except for cost could be rendered on plea of set-off, and that his intervenor owed nothing, and there was no authority to try questions as between the land Co. and the iron Co. respecting assets under the jurisdiction of his court.

He disallowed the claim of Wing, assignee, as an original unadjudicated claim, holding that the subscription by the land Co. to the capital stock of the iron Co. made in Virginia before the iron Co. had registered its charter in Tennessee, but by agreement of parties to be performed in Tennessee, the iron Co. being originated, organized, and dominated by the land Co. to serve its end, was in

contravention of the law and public policy of this State, and was, therefore, not enforcible in this suit. The petition of Wing, assignee, was dismissed with cost.

With respect to claims assigned to Wing, assignee, in compliance with the terms of the decree of the Federal court in the case against the iron Co., he held that Wing was not entitled to recover thereon in this case for the benefit of the creditors of the iron Co., but that as the assignments were made under orders in that cause, the assignors were prosecuting claims on collaterals or securities given them by the land Co., the assignors should not be prejudiced thereby, and the assignors were permitted to prove their claims in this case and recover up to satisfaction.

He decreed in favor of Carhart on the bonds held by him, holding that he was a *bona fide* holder of the same, and that he was entitled to recover thereon, subject, however, to the priorities fixed by law as adjudicated in his decree. It being suggested that
107 said Carhart owed the land Co. something, the matter was referred to the master, and the sum so found to be due from him was to go as a set-off against his recovery.

He held that the contract of the Travellers' Ins. Co., under which it loaned the money to the land Co., was not illegal because in contravention of our statutes defining *of* the terms upon which foreign corporations may do business in this State, and that said insurance Co., by its mortgage, acquired a valid lien upon the property therein conveyed, but subordinate, however, to debts due residents of Tennessee contracted prior to the registration of its mortgage and subordinate to the rights of creditors with title retained either in writing or by parol in any personal property covered by the mortgage and liens registered, and the liens of bondholders, furnishers, etc., preserved by suit or otherwise, as prescribed by law.

He further held that, in the purchase of the properties covered by its mortgage at the sale thereof by the master, the insurance Co. took the property so sold subject to such equities, liens, and titles retained and preserved, and that in settlement of the purchase price it was entitled to apply as a credit on its debt such part as remained after discharging its proportion of the cost and expenses of this suit and paying specific liens in full and its proportion of the then existing indebtedness of the land Co. due residents of Tennessee.

He also decreed that the P. Fleming & Co. decree and the title retained by the Edgefield & Nashville Mfg. Co. in furniture were payable in the first instance out of the property sold the Ins. Co., but that, if it so elected, it could have a reference to ascertain the relative value of the property in which title was retained to
108 the price paid for the entire property, and that the proceeds of the sale should respond in the first instance to the claim of the Edgefield & Nashville Mfg. Co. to the extent of the value so ascertained, any remainder of the claim to be paid in its appropriate class.

He disallowed the King, Preas, and Boyd, and Maden and wife claims, holding that the rights of these parties were founded on obligations entered into after the insolvency of the land Co.; that

the sum collected from Preas was on his new undertaking as surety, and that any right that Boyd had as surety must be upon his last undertaking, and that the assignee of Maden and wife must look to the new undertaking of the land Co., or show the insolvency of the company and its sureties. The petitions of these parties were dismissed with cost.

He held that national banks located in Tennessee were not foreign corporations, but residents of Tennessee in the eye of the law, and as such entitled to the priority in the distribution of the assets of the land Co. provided for by the statutes.

He held that the holders of the mortgage bonds of the Carnegie Iron Co. who presented and proved them in the case in the Federal court at Knoxville were not prejudiced by their failure to assign such bonds to Wing, assignee, and that the two companies being insolvent their claims may be presented, proven against both, and *pro ratas* received until their claims were paid in full.

In the matter of marshalling the assets and priorities he held that taxes, ascertained under the reference made after sale under the statutes requiring such reference, should be first paid, but so apportioned that the hotel and property mortgaged therewith pay the taxes chargeable thereon, the mortgaged property to secure bonds, the taxes thereon, without reference to the dates of the respective mortgages, and that the penalties allowed by statute
109 and not an incident of the mode of collection be allowed.

He decreed that privilege taxes presented by petitions in the case and established should be apportioned and paid as a debt due a resident of Tennessee with respect to the mortgage, but as between the State and other creditors in the same class they were to be first paid.

He held that the proper cost and charges of this litigation, including reasonable fees to solicitors filing the general creditors' bill and solicitors bringing suits under the orders of the court in this case, and the cost, expenses, and proper counsel fees of J. H. Cure, under orders of the court, should next be paid.

That the property mortgaged to the Travellers' Ins. Co., after deducting the P. Flemming & Co. claim and value of such property as the Edgefield & Nashville Mfg. Co. retained title to, should bear its proportion of such cost and the proceeds of the sales of the other properties their proportion; that all debts contracted prior to Nov. 23, 1891, and due residents of Tennessee be next paid out of the remainder of both funds, but so *prorated* that each fund bear a like *per centum* of such debt; that the remainder of the proceeds of the Carnegie hotel and property mortgaged therewith be credited on the mortgage debt of the Travellers' Ins. Co.; that all debts due residents of Tennessee contracted after Nov. 23, 1891, and before Feb. 10, 1893, be next paid out of the proceeds of the sale of the property other than the Hotel Carnegie and property mortgaged therewith to the Travellers' Ins. Co.; that this class of debts was to be paid out of the proceeds of property mortgaged to secure mortgage bonds; that the holders of mortgage bonds under the mortgage registered Feb. 10, 1893, be next paid; that resident creditors

whose debts were contracted after Feb. 10, 1893, be next paid; that creditors, non-residents of Tennessee, by simple contract,
110 without reference to the date of their claims, be next paid.

In recasting his report the master was directed to eliminate usury paid by the assignee after June 3, 1893, or to deduct it from claims presented and proved, and proof was to be heard as to this matter. He also directed the master to hear further proof and ascertain and report claims contracted partly before and partly after the mortgage of Nov. 23, 1891, and the mortgage of Feb. 10, 1893, and show the facts in this respect in his report. He also opened the proof as to the claim of Mrs. Laura Farr, to the end that it be shown when she furnished the money she claims for, to whom furnished, and under contract with whom. He was also given directions as to the settlement to be made with Cure, assignee, and as to taxes and their ascertainment. The matter of the probable cost of the cause, compensation for solicitors filing the general creditors' bill, expenses and costs of Cure, assignee, and the proper fees to be allowed solicitors suing under the order of the court were referred, and he was ordered to commence hearing proof on the matters referred by a certain day and to close by a certain day.

The master filed his report of settlement with Cure Aug. 27, 1896. It covers eight pages of the record, and will be found in volume 6, from page 1836 to 1844.

His report as to taxes was filed Aug. 22, 1896, and covers some nineteen pages of volume 6 of the record.

He also filed his general report under the order of reference and the provisions of the decree of July 3, 1896, and former decrees. This report covers some 38 pages of the transcript, and will be found in volume 6 of the record, from page 1915 to 1954.

Various parties filed exceptions to these reports. These exceptions occupy and cover some 40 or 45 pages of volume 6 of the record, and it would be needless labor to recite them at this
111 place. We will, however, notice them in so far as they are involved in the assignment of errors before us on the part of parties appealing.

Its summary shows a total indebtedness on the part of the land Co. of $271,321.55 and assets amounting to $66,123.31, leaving a deficiency of $205,198 24. He reports the cost—counsel fees, assignee's expenses, etc.—at $17,961.38. This, it seems, would leave only $48,162.93 applicable to the payment of the debts of the concern. He reports the Tennessee debts contracted prior to Nov. 23, 1891, at $29,377.36; Tennessee debts between Nov. 23, 1891, and Feb. 10, 1893, at $13,794.35, and Tennessee debts since Feb. 3, 1893, at $1,860.97, and the simple contract debts of non-residents, including balance due on the mortgage debt of the Travellers' Ins. Co. and under the Sully-Carhart mortgage, at $186,986.64. He specifies in his report the sum going to each class of creditors from the proceeds of the sales of properties after charging each debt with its proper proportion of taxes, expenses, etc., in accordance with the adjudication of the court, and his report sets out how the funds should be applied to respective claims.

The chancellor finally heard the cause Sept. 3, 1896, upon the record at large and the reformed reports of the master and exceptions thereto filed by the land Co. and various other parties. He modified the report by sustaining in part the findings of the master as to amounts to be charged to and credited to certain parties and in some other minor parts, by consent of parties, and in all other respects the report was confirmed and the master directed to distribute the funds accordingly.

A. B. Carhart and Wilberforce Sully, A. R. Wing, assignee and receiver of the Carnegie Iron Co.; Frame King and R. S. Boyd, The Travellers' Ins. Co., John I. Cox, receiver of First National Bank of Johnson City, Tennessee, two of the complainants in the original bill, prayed an appeal from this and former decrees to the supreme court, each one appealing from particular parts of the decree of the chancellor.

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Each party appealing was required to execute an appeal bond in the penalty of $750.

Carhart and Sully, A. R. Wing, assignee; R. S. Boyd, and Frame King, Maden and wife; John I. Cox, receiver; the Travellers' Ins. Co., Shields Bros., and the Scioto Star Fire Brick Works perfected their appeals by giving bonds.

We will state the errors assigned as briefly as we can. The Travellers' Ins. Co. assigns as errors:

First. That the chancellor erred in holding the general assignment by the Carnegie Land Co., June 3, 1893, to be fraudulent in law and void.

This holding of the chancellor was predicated upon the fact that the assignment provided for the payment of all its creditors equally, thus ignoring the provisions of the act of 1877, chapter 31, giving a preference to resident creditors of foreign corporations doing business in this State, and the insistence is that this act is repugnant to section 17, article 2, of the constitution of this State, which is that "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." It is also argued that the act of 1877 referred to violates the last clause of section 8, article 11, of the constitution of this State, which provides that "No corporation shall be created, or its powers increased or diminished by special law, but the General Assembly shall provide by general laws for the organization of all corporations hereafter created, which

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laws may at any time be altered or repealed, and no such alteration or *appeal* shall interfere with or divest rights which have become vested." It is also insisted that this act contravenes section 16, article 1, of the bill of rights prohibiting cruel and unusual punishment. It is further insisted that the act violates section 2, article 4, of the Constitution of the United States, which is, "The citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States;" and also section 1, article 14, of the Federal Constitution, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Second. The court erred in holding resident creditors of Ten-

nessee whose debts were contracted before the mortgage of the land Co. to the Travellers' Ins. Co. on a designated part of its property entitled to participate in the proceeds of the sale of the property thus mortgaged prior to the rights of the insurance Co., because at the time of its loan and the mortgage to it the land Co. had an abundance of property not covered by any lien, and the act of 1877, conceding its validity, was not intended in such case to give such resident creditors any right of priority to the proceeds of property thus mortgaged by a foreign corporation doing business in this State over its mortgagee debtor living in another State.

Third. The court erred in holding the general assignment void for any reason, because the pleadings did not assail its validity and there was no issue made as to its validity.

Fourth. The chancellor erred in his decree confirming the sale of the Carnegie Hotel property to this appellant.

Fifth. He erred in his decree in holding that the purchaser of the Carnegie Hotel property took the same subject to all equities,
114 liens, and titles against it, and that in settlement of the purchase price the purchaser can only apply to its debt such part as remains after discharging its proportion of the cost and expenses of this suit and after paying specific liens in full and its proportion of the then existing indebtedness of the land Co. due to residents of Tennessee.

Sixth. He erred in holding that the fund arising from the sale of the hotel property should be onerated with a part of the general expenses of this suit—that is, as *pro rata* share of the fees of the solicitors for filing the original bill in this cause and the solicitors of Cure, the assignee, the interest accrued on debts since the mortgage to appellant, and the protest fees on the notes.

Seventh. He erred in overruling appellants' exceptions Nos. 2, 3, 4, 14, and 15 to the master's report.

We may observe here that exceptions 2, 3, and 4 refer to fees allowed certain solicitors in the report of the master. Exception 14 refers to interest reported by the master accruing on debts to resident creditors and protest fees, and = 15 refers to cost, commissions, and attorneys' fees.

Eighth. He erred in permitting creditors holding bonds of the Carnegie Iron Co. delivered to them by the land Co. to participate in the distribution of the assets of the land Co. until they surrender such bonds, to become a part of the assets in this case, for distribution.

Ninth. He erred in holding that the fund arising from the sale of all the land company's property should be onerated with the payment of all debts contracted prior to Nov. 3, 1891, the date of the mortgage to appellant.

115 Tenth. He erred in allowing the claim of H. C. Jarvis as against appellant.

We find errors assigned styled "Assignment of errors by complainants in the original bill."

As stated in a former part of this opinion, The American National Bank of Tennessee, Shields Bros., of Knoxville, Tennessee, and The

Scioto Star Fire Brick Works, a corporation of Ohio, were the complainants, filing the original bill in this cause. We find a bond for appeal executed by Shields Bros. and the brick works company, but the American national bank is not a party to it. We therefore infer and hold that the American national bank is not before us, and the errors assigned and styled as above indicated are intended, we infer, to apply only to the complainants giving the appeal bond. These errors assigned are:

First. That the court erred in holding that the proof sustained the allegation that Carhart is a *bona fide* holder of the bonds sued on by him, pledged to him and Mrs. Myton by Wilberforce Sully, treasurer of the land Co., and that the hypothecation of said bonds was not unlawful, and that Carhart was entitled to recover thereon, but subject to the priorities fixed by law.

The insistence under this error is that the pledge or hypothecation of the bonds by Sully was wholly unauthorized; that Carhart was effected with knowledge of his want of authority, and that the transaction, viewed in the light of all the facts and the relation of the parties to it and the land Co. and its condition at the time, clearly evince that it was a fraud.

Second. The chancellor erred in adjudging that intervening creditors of the land Co. in this cause who held, as pledgees of the land Co., bonds of the Carnegie Iron Co., and who had intervened in the Federal Court case, wherein the iron Co. was being wound
116 up as an insolvent concern, and had been allowed to share in the proceeds of the iron Co. upon assigning their claims against the land Co. to the assignee of the iron Co. under the terms of the decree of the Federal court in that case, should "be permitted to prove their claims in this case and recover up to satisfaction."

Wing, assignee of the Carnegie Iron Co., has assigned errors as follows:

First. The chancellor erred in not holding that the decree in the Federal court at Knoxville in his favor as assignee of the Carnegie Iron Co. fixing the amount of the liability of the land Co. to the iron Co. on account of subscriptions to the capital stock of the latter amounted to *res adjudicata* as to that question, and in refusing to permit him, for the use and benefit of the creditors of the iron Co., to share in the distribution of the assets of the land Co. being administered by his court in this case.

Second. He erred in holding that the subscription of the land Co. to the capital stock of the iron Co. had not been legally made, or if legally made in Virginia that it was not enforcible in this State, because such subscription to the capital stock of one corporation by another was contrary to the law and public policy of this State.

Third. He erred in not holding the claim of Wing, assignee, fixed by the decree of the Federal court, to be valid, and in not giving it a place with and the preference attached to claims of resident Tennessee creditors secured by the act of 1877, chapter 31.

Fourth. He erred in holding that Wing, assignee, was not entitled to recover on the claims of the creditors of the land Co. assigned to

him by such creditors under the terms of the Federal Court
117 decree as and to the extent provided in said decree, but that the assignors of such claims should be permitted to recover.

Fifth. He erred in refusing to consider the deposition of John W. Cure, assignee, taken in the Federal Court cause and read in this.

Sixth. He erred in overruling the exceptions of appellant to the master's supplemental report, and those to his reformed report.

Seventh. He erred in holding that Carhart and Sully were entitled to the mortgage bonds sued on by them, and in overruling the master's first report disallowing the same.

Eighth. He erred in sustaining the original bill as a general creditors' bill, and that the assignment of the land Co. to John W. Cure was fraudulent and void, because it violated the act of 1877, chapter 31, and attempted to defeat the preference given thereunder to creditors, residents of Tennessee.

Ninth. He erred in allowing $5,000 or any other sum as fees to solicitors who filed the original bill in this cause.

Tenth. He erred in his decree of July 3, 1896, in holding that any sum less than the whole sum due the Edgefield & Nashville Mfg. Co. was payable by the Travellers' Ins. Co., and under this error it is insisted that this whole amount should have been decreed to be paid by said insurance Co., the purchaser of the Carnegie hotel and its property, not out of the $25,000 bid by it for said property, but in addition thereto. This contention is rested upon the terms of the decree under which the property was sold, and which appears in a previous part of this opinion.

Eleventh. He erred in holding that said ins. Co., if it so elect, may have a reference to ascertain the relative value of the property in which title was retained by the Edgefield & Nashville Mfg. Co. to the price paid for the entire property, and that the proceeds of
118 its sale should respond in the first instance to the claim of the Edgefield & Nashville Mfg. Co. to the extent of the value so ascertained.

Twelfth. He erred in overruling appellants' exception to the master's report, wherein he reported that $1,376.87 should be paid out of the proceeds of the hotel and its properties on the debt of the Edgefield & Nashville Mfg. Co.

Thirteenth. He erred in holding that the P. Fleming & Co. decree, which was a lien on the hotel property, could be paid by the insurance Co. out of its bid of $25,000 for said hotel property, and in overruling the exceptions of appellant to the reformed report of the master relating to this item.

Fourteenth. He erred, if his decree of July 3, 1896, is to be construed as sustaining the exceptions to the Federal Court transcript containing judgments sued on filed by the insurance company and H. C. Jarvis, in so far as said exceptions were sustained.

Fifteenth. He erred in treating and holding that the Federal Court decree was not *res adjudicata* as to all matters adjudged by the Federal court involved in the pleadings in the case before him, instead of holding it an adjudication only to a limited extent.

We have not stated the errors assigned by this appellant in the exact form in which they appear in his brief, but it is believed that we have presented his contentions.

Carhart assigns the following errors:

First. Error in sustaining the bill of the American national bank as a general creditors' bill.

Second. Error in decreeing that the *ad valorem* taxes assessed by the State, county, and municipality upon the property of the land Co. after the mortgage to Wilberforce Sully was a prior lien on the property to that of the mortgage.

Third. Error in refusing to hold the Travellers' Ins. Co.
119 liable for the debt of the Edgefield & Nashville Mfg. Co., inasmuch as, under the decree for the sale of the Carnegie Hotel property, the insurance Co. in becoming the purchaser of said hotel property assumed the debt of the company aforesaid.

Fourth. Error in ordering the cost and counsel fees for creditors filing the original bill and the compensation of the assignee and his counsel's fee to be paid out of the funds realized from the sale of the mortgaged property, instead — out of the fund going to the general creditors.

Fifth. Error in allowing interest on Tennessee debts accruing after the mortgage as prior to the mortgage.

Sixth. Error in holding that the debt due the American national bank was prior to his, secured by the mortgage.

Seventh. Error in holding the acts of 1877 and 1891 to be constitutional by giving Tennessee creditors of the land Co. a preference over non resident creditors.

Eighth. Error in holding that Tennessee creditors were entitled to preference over the mortgage creditors, and for that purpose decreeing that the act of 1877 as to distribution of assets applied instead of the assignment act of 1881.

These last two errors are filed under a writ of error sued out for the purpose of reviewing the decree in the particulars complained of.

John I. Cox, receiver of the First National Bank of Johnson City, files two exceptions to the decree, one of fact and the other of law. They are as follows:

First. Error in finding that the sum of 218.50 sought to be set off against the note sued on by him was paid as usury to him or that the notes sued on by him embraced that amount of usury.

Second. Error in refusing to give him a decree for the full
120 amount of the note sued on, unless he submitted it to the set-off of $218.50 alleged to be usury.

Wm. E. Maden and wife and the assignee of their claim, Wilberforce Sully, except to the decree because the latter, as the assignee of the former, was not permitted to share in the distribution of the assets of the land Co. in the satisfaction of that part of the decree in favor of Maden and wife against the land Co., which was not paid out of the proceeds of the sale of the lands they had previously sold to the land Co. The complaint of these parties rests upon its particular facts, and it will be fully noticed and disposed of hereafter in this opinion.

The record in these consolidated causes covers about 1,990 pages of typewritten matter. The errors, as before disclosed, are numerous. The briefs and reply briefs of counsel cover, perhaps, 245 pages, and they are compact and full of concise and forcible arguments, supported by reference to numerous authorities. It is therefore a matter of practical impossibility to notice all the arguments and contentions made and discuss them in the light of the authorities as cited. We will simply endeavor to classify the errors assigned and then dispose of them as briefly as we can, citing such authorities — are deemed controlling. The errors assigned may be properly grouped under the following head-:

1st. Those assailing the constitutionality of the act of 1877, chap. 31, and the acts amendatory thereof, and the results following from the enforcement of said acts as they effect certain creditors of the Carnegie Land Co.

2d. Those relating to the force and effect to be given to the decree of the Federal court in the proceedings in that court to wind up the Carnegie Iron Co. as an insolvent corporation, as it relates to the claims of certain creditors of the land Co. holding
121 the bonds of the Carnegie Iron Co. as collaterals and as it fixes a claim against the land Co. for its subscription to the capitol stock of the iron Co.

3d. Those relating to costs and counsel fees allowed by the chancellor to be paid in part or proportionately out of the funds derived from the sale of property under mortgage.

4th. Those relating to the decree, in so far as it allows interest upon debts and protest fees accruing on the Tennessee debts and counsel fees thereunder after the mortgages as preferred claims over the mortgage debts.

5th. To that part of his decree holding the original bill in this case to be a general creditors' bill.

6th. That part of his decree holding that State, county, and municipal taxes assessed against the property of the land Co. after the registration of its mortgages were a superior lien to the mortgage debts.

7th. To that part of the decree holding that Carhart was an innocent holder of the mortgage bonds of the land Co. and therefore entitled to participate in the assets of the land Co.

8th. Those relating to the elimination of usury from the claims of Cox, receiver of the First National Bank of Johnson City.

9th. The contention of Maden and wife and their assignee, Sully, resting, as before stated, upon the particular facts incident to their claim.

The question of the validity of the act of 1877, chap. 31, and the acts amendatory thereof meets us at the threshold of this case and must be definitely determined and in the scope and effect of the act settled. These matters adjudicated will remove many of the serious contentions presented by the record and the assignment of errors.

122 It is proper to state at the outset that the Carnegie Land Co. and the Carnegie Iron Co. were Virginia corporations

doing business in Tennessee, having complied with the laws of this State authorizing such corporations to do business here. Under the act of 1877 referred to, if it be constitutional, it is conceded that the creditors of the land Co., residents of this State, whose debts were contracted before it put any mortgage on its properties and had the mortgage registered, are entitled to priority of payment out of its assets. But the contention is made that the interest on such debts accruing after the registration of the mortgage and protest fees for their non-payment and counsel fees for their collection, provided for in the face of such contract debts, are not entitled to priority. In other words, it is argued that the act is to be strictly construed, even if held to be constitutional, and under such construction it gives a preference to resident creditors for their debts as and to the extent they existed at the time the mortgages were put upon its property by the land Co., and not as they subsequently existed by virtue of the accrual of interest, protest and counsel fees. The further contention is made that this preference given by the legislature to resident creditors was not intended to limit and restrict the right of such corporations to mortgage their property to raise money to carry on their business, and to give their mortgage the benefit of the usual lien incident to such mortgage creditors, but that the preference intended was to meet a condition of insolvency and the disposition of assets in view of this condition.

The Travellers' Ins. Co. in this connection makes the further insistence that its mortgage being upon a designated part of the properties of the land Co., and the land Co. at the time having
123 other property in the State amply sufficient to pay its then resident creditors, its debt secured by its mortgage is not within the purview and intent of the act, and hence that it has the right to appropriate the proceeds of the property mortgaged to it to the payment of its claim.

With respect to the constitutionality of the act of 1877, referred to, and the acts amendatory thereof, it is to be observed that our supreme court in a number of cases involving the affirmance or denial of rights has in effect sanctioned their validity, and it is argued that the direct question of their constitutionality has been before the court for construction a number of times. The following cases are cited:

Young *vs.* South Tredegar Iron Co., 1 Pickle, 198.
State *vs.* Phœnix Ins. Co., 8 Pickle, 420.
Cary-Lombard Lumber Co. *vs.* Thomas, 8 Pickle, 587.
L. & N. R. R. *vs.* M. & T. R. R., 8 Pickle, 683, 693.
Milan Milling Co. *vs.* Garten, 9 Pickle, 591.
State *vs.* O'Brien, 10 Pickle, 81.
Pioneer, etc., Loan Co. *vs.* Cannon, 12 Pickle, 591.
Ins. Co. *vs.* Kennedy, 12 Pickle, 711.
C. M. McClung & Co. *et als. vs.* Embreville, etc., Co., M. S. Knoxville, September term, 1895.

It is also said in support of the validity of this act of 1877, chap. 31, that it has been recognized and amended by succeeding legisla-

tures as many as four times—act of 1891, chap. 122; act of 1895, chap. 129; act of 1895, chap. 81; act of 1897, chap. —.

With respect to the last act cited, act of 1897, we have not had the benefit of it, because the acts of the legislature of that session have not been printed.

It is also said that the amendatory act of 1895, chap. 119, was construed and declared to be constitutional by our supreme
124 court in a recent manuscript opinion published in the Southwestern Reporter. It is also insisted that the constitutionality of both the act of 1877, chap. 31, and of 1891, chap. 122, was directly passed upon in the Cary-Lombard case in 8 Pickle, *supra*.

The majority of the court are of opinion that, in view of these decisions, the acts complained of are constitutional and should be enforced, and that in this view it is unnecessary for the court to intimate what opinion it might reach were the question before us uneffected by the opinions of the supreme court before cited.

The writer of this opinion does not concur in the opinion of the majority of the court, and will express his dissent in a separate opinion on this point.

The court also holds that the debts of resident creditors contracted before the making and registration of any mortgage by the land Co., being given a preference, also carries the preference as to the interest accruing upon the debts, interest being merely an incident of the debt. This preference also attaches to the protest fees, but it does not exist as to counsel fees provided for in notes. We, in effect, as the majority holds, held this proposition last winter at Nashville in the case of Garrett *vs.* Adams, affirmed by the supreme court, and which will be found in vol. 39 of S. W. Rep., 731, 733, 734.

Barton, J., does not concur in this opinion excluding the preference as to counsel fees, and does not think the case referred to, reported in the Southwestern Reporter, applies.

The next class of errors to be noticed applies to the force, effect, and scope to be given to the decree of the Federal court in the proceedings in that court to wind up the Carnegie Iron Co. as an insolvent corporation. Briefly stated, the facts pre-
125 senting the question arising upon this aspect of the case are these:

One Witherow and others filed a bill in the Federal court against the iron Co. and its assignee and others to recover a large claim they held against the iron Co. The land Co. was made a defendant to that bill. The assignee of the iron Co. filed an answer and cross-bill, and asked that his cross-bill be taken as a general creditors' bill to wind up the corporation as an insolvent concern. His cross-bill was sustained as a general creditors' bill by the Federal court. Pending the litigation here, in the chancery court below, it was discovered from schedules of assets filed by Cure, assignee of the land Co., that the land Co. had a claim of some $58,000 against the iron Co. for money, etc., advanced to it or for its benefit. Upon application of complainants to the original bill by petition, the assignee and receiver of the land Co. was directed by the chancery court to intervene in the Federal court and set up this claim for some $58,000

against the iron Co. in the Federal court. The chancellor designated disinterested counsel to represent the assignee and receiver of the land Co.—to represent his assignee and receiver before the Federal court. These parties, by their counsel, did intervene in the Federal court by proper petition to set up and have allowed the claim of the land Co., amounting to some $58,000. The assignee of the iron Co., in the Federal court, contested the allowance of this claim by a cross-petition or cross-answer in which he insisted that it was true that the iron Co. had received these advances from the land Co., but that the land Co. was indebted to the iron Co. in the sum of $250,000 on account of subscription to the capital stock of the iron Co., and that, this being so, the land Co. was indebted to the iron Co. after giving it credit for the $58,000 or $59,000
126 in the sum of $190,000. The parties went to proof on this issue. The Federal court held and decreed that the land Co. had subscribed to the capital stock of the iron Co.; that it had not paid its subscription further than the advances for which the land Co. was suing, and that it was indebted to the iron Co. for the balance of its subscription to its capital stock, and thereupon rendered a decree accordingly, and directed its assignee to intervene in the chancery court in this case for the purpose of presenting the claim of the iron Co. as decreed by the Federal court, and to have it allowed, and to be permitted to participate in the distribution of the assets of the land Co. for its satisfaction. The Federal court also decreed, in substance, with respect to creditors of the land Co. holding as collaterals to secure their debts the bonds of the iron Co. that they might participate in the assets of the iron Co. to the extent of the bonds held by them, but that before they could do so they must assign their claims against the land Co. to the receiver of the iron Co. to the end that he might be permitted to apply to the land Co. for the privilege of participating in the distribution of its assets based upon the claims thus assigned to him.

As indicated in a former part of this opinion, the chancellor held that the decree of the Federal court amounted to *res adjudicata* so far as it disallowed a recovery upon the claim of the land Co. presented by its assignee and receiver under the orders of his court, but that it was not *res adjudicata* in so far as it gave an affirmative decree against the land Co. based upon its alleged subscription to the capital stock of the iron Co.

We hold that the decree of the Federal court was *res adjudicata* as to both matters. All the parties were before that court; the direct question was litigated between them; it was a court of competent jurisdiction; its decree was not appealed from, hence it is
127 binding upon this and all other courts in a collateral attack.

We deem it unnecessary to go into an extended discussion or citation of authorities to support this conclusion. We cite the following authorities: Sly *vs.* Hunt, 32 Am. St. Rep., 403, and authorities cited; Wright *v.* Griffey, 37 Am. St. Rep., 228; notes and authorities cited; Simons *vs.* Page, 96 Tenn., 718; McCadden *v.* Slanson, 96 Ten., 586.

We are also of opinion that the chancellor was in error in his

holding that the claim of the iron Co., as evidenced by this decree of the Federal court, could not be enforced because it was based upon a subscription to the capital stock of the iron Co. by the land Co., and that such subscription by one corporation to another was contrary to the legislation and public policy of this State.

It may be sufficient to say that this question as well as all others connected with the validity of the subscription were involved before the Federal court and decided by that court, and, whether right or wrong, the decree of that court, being unappealed from, is binding. Moreover, whatever may be the question of public policy involved in the subscription to the capital stock of the iron Co. by the land Co., it is not before us in this case. The question simply of the decree of the Federal court and its validity is before us. We state, however, in order to give all parties the benefit of all the facts appearing in the record relating to this question, upon an appeal, that the Carnegie Land Co. was the parent and promoter of the Carnegie Iron Co., and that the latter was chartered in Virginia, as was the land Co., for the purpose of carrying out the ends of the land Co.

We further find that the Carnegie Land Co. made its subscription to the capital stock of the Carnegie Iron Co. in Virginia
128 before the latter was domesticated in Tennessee, or, properly speaking, before it complied with the laws of Tennessee authorizing it to do business here, and that it originally contemplated paying its subscription to the capital stock of the iron Co. in its lots situated in Tennessee.

We further find that there was no corporate action authorizing any official of the land Co. to subscribe to the capital stock of the iron Co. payable in any other way than in the property aforesaid of the land Co.; but, in our opinion, the question of public policy out of the way, the method or means of paying the subscription to the capital stock is immaterial. In other words, we hold that the subscription made payable in property, if not so paid, will be enforcible in money, at the option of the creditors of the company whose capital stock was thus subscribed to.

Beach on Priv. Cor., vol. 2, 899, 900, an- authorities cited on note 1, page 900.

Morawatz, 1 ed., sec. 297.

The above holding with respect to the force and effect of the decree of the Federal court also controls the other question appertaining thereto.

With respect to the creditors of the land Co. who assigned their claims to the assignee of the iron Co. in the Federal court, the simple result is that the decree of that court, unappealed from, will be taken and enforced in this proceeding.

The next class of errors relates to cost and counsel fees allowed by the chancellor to be paid, in part or proportionately, out of funds derived from the sale of property under mortgage.

We are of opinion that these costs and counsel fees were improperly allowed, in so far as they were decreed to be paid out of proceeds

of property under mortgage. This litigation did not benefit
129 the creditors secured by mortgage; it did not enforce any lien nor create any lien secured for these parties. On the contrary, the tenor of the litigation was to overthrow or subordinate the liens secured by the mortgages. Our supreme court and this court have held a number of times that in such cases the fees of counsel filing a general creditors' bill are not payable out of the mortgaged property.

We think and hold that the chancellor committed no error in sustaining the bill as a general creditors' bill. This holding, in our opinion, would result, although the chancellor might have been in error, in holding that the general assignment was void in law because it contravened the act of 1877, chap. 31, inasmuch as it provided for the equal payment of all creditors. The general assignment was made under the act of 1881, and therefore under that act provided for the equal payment of all creditors. We do not understand that the act of 1877, chap. 31, or the acts amendatory thereof, simply by providing for a preference to be given to Tennessee creditors in certain instances, interferred with the general assignment law. In our opinion, the simple result of all this legislation was to provide for the preferential payment of certain creditors of foreign corporations under the conditions fixed by the act of 1877, and that the duty of the assignee under the general assignment would have been to pay out the assets to creditors as entitled under the law. In addition to this, the assignee under the general assignment had, in effect, invoked the aid of the court by a proper bill in the discharge of his duty; but the bill filed by complainants should have been sustained as a general creditors' bill upon the averments and grounds contained therein. The bill stated the complications and conflicts existing with respect
to the properties of the land Co. and the defaults and
130 omissions of the assignee in the performance of his trust duties under the assignment. The record discloses the fact that parties to the litigation repeatedly sought the removal of this assignee because of his relation to the land Co. and his conduct and method of discharging the trust. The chancellor, it would seem, did not remove him, but in effect directed him to report his conduct and dealings with the trust and in large part to turn over the assets in his hands to the master of his court. In so many words, he did not remove him as assignee, but made him an officer of his court in the administration of his trust. So, in effect, he did treat him as receiver, and his decree or order sustaining the bill as a general creditors' bill is correct and was sanctioned by the averments of the bill and the condition of the property and the condition of the corporation sought to be wound up in his court. In our opinion the assignee should have been promptly removed and some other suitable persons appointed receiver in his place.

The next class of errors refers to the decree of the chancellor holding that State, county, and municipal taxes assessed against the property of the land Co. after the registration of its mortgages constituted a prior lien to that created by the mortgages.

In this we think his honor was in error. We have held in accordance, we believe, with the opinions of our supreme court that taxes assessed against property were a debt due the State, county, or municipality by the party against whom they were assessed, and that they did not displace liens upon the property created before their assessment.

The majority of the court hold that under act of 1871, ch. 68, Code M. & V., sec. 807, requiring a reference to ascertain the taxes due on real estate when sold under decree of court before a confirmation of sale, makes the taxes so ascertained a charge on the
131 fund realized from the sale.

I do not concur in this view in the sense in which he understands its application in this case.

The contention of Cox, receiver of the First national bank, is that he was compelled in effect to refund usury paid upon claims upon which he sued, and that under the decisions of the Supreme Court of the United States usury paid to a national bank cannot be recovered in an action of set-off against a claim sued on, and that under the national banking act the usury recoverable from a national bank must be sued for in a separate action. His contention as thus presented is well supported by the authorities. The act of Congress with respect to usury paid to a national bank is as follows:

"In case the greater rate of interest has been paid, the person by whom it has been paid or his legal representative may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. U. S. Rev. Stat., sec. 5198."

Our court has held that the provisions of the Federal banking act imposing penalties upon national banks for taking usury supercedes the State laws on that subject, and that the construction of that statute, being a Federal question over which the Supreme Court of the United States has jurisdiction, the State courts will yield to the authority of that court in the construction of the act.

Hambright *vs.* Bank, 3 Lea, 40, 41.
Barnes *vs.* Bank, 98 U. S., 555.
Driesbach *vs.* Bank, 134 U. S., 52.

Additional authorities might be cited in support of the general proposition of law advanced by the receiver, but the question
132 that occurs is, Does the receiver put himself in this record in an attitude to invoke the application of the principle he contends for? He comes into a court of equity administering the assets of an insolvent corporation for the benefit of all its creditors. Thus presenting himself in such a case, we think he should come with a claim equitable in its nature. In addition to that, he comes into court presenting a claim or notes signed by the assignee of this insolvent corporation, after its insolvency was declared, after it had made its general assignment, after it was in court to be wound up

under this general creditors' bill, and in the face of the fact that this assignee in giving the notes sued on did so without the sanction of the court administering the assets of the insolvent corporation. In such case we are unable to hold or to find any authority holding that his claim should not be purged of its usury.

There was no error, in our opinion, in this part of the decree of the chancellor.

The next class of errors relates to the validity of the mortgages held by Carhart.

The contention of counsel is that Carhart was not an innocent holder of these mortgages, and that he bought them affected with a knowledge of the want of authority on the part of Sully to pledge them as collaterals to secure his debt and that of Mrs. Myton. It is also said in support of the contention against the validity of these mortgages that they were taken as collaterals to secure the payment of a pre-existing debt, and that therefore he was not an innocent holder.

Now the facts are, with respect to this matter, that the corporation at a regular meeting authorized an issue of $300,000. It also appears that the corporation at a regular meeting authorized
133 the sale of these bonds at not less than 60c. on the dollar, and the bonds were placed in the hands of Mr. Sully, as its treasurer, in New York. Thereafter, being unable to sell the bonds, eighty-five of them were hypothecated to secure a debt due Mrs. Myton and to Carhart, and the hypothecation was made in consideration that Mrs. Myton would surrender bonds of the Carnegie Iron Co, held by her as collateral, and that an extension of time would be given by Carhart on his debt, and that he would advance $2,000 to meet the indebtedness of the land Co. It is very true that there was no express corporate action authorizing the pledge of these bonds, but it appears that the treasurer and president of the company, Gen. J. T. Wilder, after consultation with some of the other directors of the company, did sanction the pledge. It furthermore appears that the creditors of the land Co. are still claiming and holding on to the bonds of the Carnegie Iron Co., released by the parties when they took in pledge the bonds of the land Co. to secure their claim.

We are of the opinion that under the law, the bonds having been regularly issued by the corporation and placed in the hands of its managing officers, that these officers had the right and power to pledge the bonds to secure advances to carry on its business or prevent the enforcement of claims which would have embarrassed or broken up the continuance of its business.

Baxter *vs.* Washburn, 8 Lea, 1.
Hunter Bros. *vs.* Memphis Gaslight Co., 11 Pick , 136–144.
Dunscombe *vs.* R. R. Co., 84 N. Y., 190.
Jones on Pleadings, sec. 73.

134 If we be correct in this holding, the holders of the bonds were innocent holders in the sense of the law, and therefore entitled to recover.

Authorities *supra*.

It is very true that the bonds were pledged to secure the debts of Carhart and Mrs. Myton, and under the contract or pledge their sale was authorized to be made by the pledgee either at public or private sale, and the pledgee was authorized to become the purchaser at his own sale. The bonds seem to have been sold at public sale after due notice and advertisement, in accordance with the contract of hypothecation. And while there are some suspicious circumstances unexplained connected with the transaction, the proof fails to disclose any fraud that would vitiate it in a c-urt of equity.

The result is that we find no error in the decree of the chancellor sustaining the validity of the claim of Carhart, as represented by the assignee Sully.

The next error assigned relates to that of Mr. Maden and his wife and their assignee, Mr. Sully. The facts with respect to this contention are these:

Maden and wife and their assignee, Mr. Sully, intervened in this case by petition, for the purpose of setting up and claiming a balance due on a judgment recovered upon a vendor's note against the Carnegie Land Co., the original judgment being for $1,521.55. The original decree on the vendor's note was in the case of Maden and wife *vs.* The Carnegie Land Co. *et al.*, and was to recover on a vendor's note for $2,441.25. June 7, 1893, Maden and wife recovered a judgment against the land Co. in the chancery court at Johnson City for $1,521.55, and had a decree for the sale of the real es-
135 tate on which their judgment or decree was a lien. The master under that decree made a sale, and Maden and wife became the purchasers at the price of $1,592.92, giving their note for the purchase price. The Carnegie Land Co., by its secretary, J. W. Cure, filed its petition in the case to open the biddings, and they were opened at the advanced bid of $1,752.21 made by the land Co, and the land was sold to the Carnegie Land Co. at its raised bid. The purchase-money note given by the land Co. to cover its bid not being paid at maturity, a decree was rendered on the same by the chancery court June 5, 1894, against the land Co. for $1,722.21, and the land ordered to be resold for cash in hand in bar of the equity of redemption. The land was resold and purchased by Wilberforce Sully, who had in the meantime become the owner and assignee of the decree of Maden and wife. Sully bid in the land at the sum of $1,000, which he paid in cash. For the balance due Maden and wife or their assignee the petition in this case was filed to recover. In the petition it is averred that Maden and wife are residents of Tennessee and have been ever since 1890, and it is asked that the priority attaching or belonging to Tennessee creditors be applied and enforced with respect to this debt. It appears from the proof that Maden and wife have lived in Washington county, this State, since 1889. It also appears that the indebtedness of the Carnegie Land Co. to them was contracted prior to November 1, 1891, or prior to the registration of the mortgage to the Travellers' Ins. Co. The master at first reported and allowed the claim as one contracted with Tennesseeans and made prior to Nov.

, 1891. The Travellers' Ins. Co. excepted to this report. Its ex-
eptions are:

1st. That as the land had been bid in by Maden and wife at a
rice which would have satisfied their claim, they cannot now be
heard to urge the collection of the balance due.

36 2d. That as the Carnegie Land Co., by the assignee, pur-
chased the land for $1,752.21 after the insolvency of the
ompany, the claim is founded upon an obligation entered into
fter insolvency and cannot bind the assets herein.

The chancellor, it seems, sustained the latter contention.

We do not think that this contention is well founded in law.
Iaden and wife had nothing to do with the raised bid of the Car-
negie Land Co. by its treasurer, secretary, or assignee, nor did they
ave anything to do with the security taken by the master for the
ayment of the bid or raised bid made by the land Co. We think
hat — law is that the mere sale of the property under an execution
r process issued on a decree does not amount to a payment of the
udgment nor a satisfaction of the decree.

2 Freeman on Judg't, sec. 498 *et seq.*, and authorities cited.

It is said that this advanced bid by the land Co., made in the
person of the assignee Cure, was without authority, and that it
never received the sanction of the court, as shown in this record.

We are unable to give much weight to this objection. It is very
true that the record fails to disclose any order of the court author-
izing the assignee Cure to raise the bid in the case referred to;
but the assignee, in his report of assets, filed after his purchase
under the raised bid, reported these lands as a part of the assets of
the land Co. in his hands, and he reports certain revenues derived
therefrom.

The master, in his report filed June 13, 1895, reports the farm
thus bid in as a part of the assets of the land Co.

It, moreover, appears that the taxes on this land were paid out of
the funds of the land Co. being administered by the court.

137 We take it that creditors accepting the benefits of this pur-
chase will not be permitted to say, after all these ratifications
of the act of the assignee, that the purchase is not binding upon
them. They cannot be permitted to accept the property thus pur-
chased and its proceeds and at the same time be exonerated from
the burden incident to its purchase.

We think the decree of the chancellor with respect to this claim
was erroneous, and so hold.

There is another error assigned by various parties which we have
not noticed, and that is to the part of the decree of the chancellor
which refuses to hold the Travellers' Ins. Co. liable for the whole
debt of the Edgefield & Nashville Mfg. Co.

As before shown in this opinion, the Travellers' Ins. Co. bought
the hotel of the Carnegie Land Co. and its properties, and it bought
it under the decree of the court hereinbefore copied. The insistence
of the parties is that under that decree the Ins. Co. bought it, sub-
ject to the liens of the Edgefield & Nashville Mfg. Co. upon the

property bought from that company and put in the hotel, and that under the terms of the decree the purchaser assumed the payment of all liens upon the property. As will be remembered, the Edgefield & Nashville Mfg. Co. sold a lot of property to the Carnegie Land Co. to be used in its hotel, but retained the title to the property so sold until it was paid for. It took notes for the value of the property it sold, and afterwards these notes were renewed, and in addition it took a number of bonds issued by the Carnegie Iron Co. as collateral to secure its debt. Under the terms of the decree of the chancellor ordering this hotel property to be sold, it was to be sold subject to all the equities existing against the property in the hands of the land Co. The chancellor held that the Travellers' Ins Co. did take the property subject to all the equities existing
138 against the property in the hands of the land Co., and that, if it so elected, it might take a reference to ascertain the value of the property of the Edgefield & Nashville Mfg. Co. embraced in the hotel and property bought by it. Such a reference was had and the value of the property sold by the Edgefield & Nashville Mfg. Co. in the hotel ascertained and reported by the master. This report, so far as the mere value of the property of the Edgefield & Nashville Mfg. Co. was involved, was unexcepted to, the contention of the Edgefield & Nashville Mfg. Co. and other creditors being that under the terms of the decree the Travellers' Ins. Co. assumed the payment of all liens existing against the property. This involves simply a construction of the decree of the chancellor. That decree, as we understand it, did not make the purchaser of the hotel property assume the payment of all equities and liens existing against the property in the hands of the land Co. It simply said that the purchaser would take it subject to the equities and liens existing against it. The decree of the chancellor with respect to this matter reached and attained the substantial ends of justice and equity, and it will not be interfered with.

We find no error in the action of the chancellor in reference to the claim of H. C. Jarvis.

Jarvis and others, in 1890, purchased some lots from the Carnegie Land Co. Jarvis paid $1,800 on his part of the purchase-money. When he was sued for balance of purchase-money he sought relief by a cross-bill assailing the sale to him for fraud and seeking to recover back what he had paid, and obtained the relief he prayed, the court giving him a decree for $1,800.

It is argued that in his cross-bill he only claimed $575. An examination of the record discloses that he amended his complaint in this respect, and, in addition, it appears that there was a
139 consent decree in his favor for $1,800 and cost. This consent decree was entered Sept. 15, 1895, and, it seems, was assented to by Jarvis in consideration that the land Co. would withdraw its appeal or abstain from taking the case to the Supreme Court by writ of error from the former decree of the chancery court in his favor.

The real difficulty in connection with this claim is over the contention whether the claim should be treated as a debt as of the date

f his decree aforesaid or as of the date of his right to recover. Manistly his right of action existed long before the land Co. placed any nortgage upon its properties. It was a debt or claim against the ompany from the time it was legally bound to pay it.

The result is, there was no error in the ruling of the chancellor ith respect to it.

Another contention in the case heretofore overlooked and depending upon the appeal of King and Boyd, who appealed and assigned rrors, needs attention. The question involved with respect to them ill appear in the following statement:

Frame King sold his interest in a tract of land in Johnson City o one Preas, and took in part payment for the purchase price a ote for $5,500, due one year after date, bearing interest, for which lien was retained. This sale of King to Preas occurred Sept. 17, 890. In December, 1891, Preas sold this same land to B. S. Boyd, nd in the deed to Boyd it was stipulated that Boyd assumed the ayment of the above note of Preas to King. A short while after Boyd purchased the land from Preas he sold it to the Carnegie Land Co., and executed a deed to said company, in which the assumption of the $5,500 note or debt due from Boyd to Preas and Preas to King was assumed. This note not being paid, King brought suit June 7, 1893, and obtained a decree in the chan-
140 cery court against the Carnegie Land Co., R. S. Boyd, and James H. Preas. Under this decree the land was sold Nov. 25, 1893, and Boyd became the bidder therefor, and it was struck off to him, but the Carnegie Land Co. raised his bid and became the purchaser at its raised biddings, Dec. 7, 1893, its bid amounting to the debt or decree and cost. Boyd and Preas became the sureties of the land Co. upon its purchase-money notes, which were executed to the master, bearing date Nov. 25, 1893. The notes of the land Co. thus secured by Boyd and Preas not being paid, judgments were taken on them, under which the land was sold for cash and brought a small sum. It seems that executions were issued on these judgments under which some of the property of Preas was sold, and the sums realized were credited and the executions returned not satisfied as to the balance. An execution was also issued and returned *nulla bona* on the original decree. Jan. 7, 1896, King filed a bill in the chancery court to impound the amount the Carnegie Land Co. was due Preas and Boyd or either of them by reason of the payments which Preas had been compelled to make for the land Co. as its surety, and by reason of the agreement that the company had with Boyd to pay him, King, the amount which he owed him, and by reason of the decree of June 8, 1893. King seeks to have said claims ascertained in this general creditors' cause, and Boyd also intervened in this cause by petition. King also filed a petition in this cause setting up his claim, and alleges that he is entitled to the status of a Tennessee creditor, because Boyd, the security of the land Co., is a resident, and that he through him is entitled to whatever rights Boyd has. The master allowed the sum which Preas had been compelled to pay as security. He also allowed the amount which Boyd, as security, would be required

to pay. After crediting King's decree of June 8, 1893, with the payments he had received from the sales of property, he also
141 allowed King the amount due him on his decree, but found that he was a non-resident. Exceptions were taken by complainants and others to this action of the master upon the ground that Boyd and Preas had become securities after insolvency, and were not therefore entitled to any relief. Exceptions were also taken by King because the master did not show that the sum reported in favor of Boyd had been impounded by him. The court held as follows in respect to the matter:

"These claims are disallowed as proper charges against the assets here to be administered. The rights of the parties are founded on obligations made and entered into after insolvency. The sum collected from Preas was on his new suretyship, and any rights of Boyd as surety must be upon his last undertaking. These petitions are dismissed and the respective petitioners and sureties will pay the costs incident thereto."

To this decree exception was taken by King and Boyd, and they prayed an appeal, which was disallowed until the further report of the master.

Aug. 22, 1896, as before shown in this opinion, the master filed his report. In this report he failed to report the indebtedness of King at all, either as a foreign or Tennessee claim. He also failed to report the amount Preas had paid for the company as its surety, or the balance which Boyd and Preas, as sureties of the company, would have to pay.

Exceptions were taken to all these matters by King and Boyd; which were overruled. They then prayed an appeal, which was granted, and have assigned errors. The errors assigned are:

First. That the court erred in disallowing as proper charges against the assets here to be distributed the claims of King and Preas, because, as recited in this decree, the rights of the
142 parties were founded on obligations made and entered into after insolvency.

We are of opinion that this error is well assigned. It is to be remembered that the decree of King, of date June 8, 1893, was founded upon an obligation which Preas had made on Sept. 17, 1890, and which the Carnegie Land Co. had bound itself to pay in the deed of Dec. 23, 1891. The sale of the land by Preas to Boyd and the assumption of the purchase-money note of Preas to King by Boyd was on Dec. 11, 1891, and the sale by Boyd to the land Co. of the same land and the assumption of the same note by the land Co. was on Dec. 23, 1891. These transactions were all prior to the assignment of June 3, 1893. It seems that his honor, the chancellor, placed his holding upon the theory that King lost or waived whatever rights he had against the land Co. by taking the decree of June 8, 1893, five days after the attempted assignment. We do not think this theory is well sustained.

68 U. S., 500.

May *vs.* Bank, 40 Am. Dec., 726.

Nor do we think that the sale under the decree and the acceptance by the master of the land Co. as a purchaser, with Boyd and Preas as security, was, or amounted to, a satisfaction of the decree of King. It is to be noted in this connection that King objected to the master taking Boyd and Preas as security of the land Co. for its purchase of the land under the decree on the ground that they were originally bound under his decree. The claims of Preas and Boyd are founded on their undertakings entered into in the respective deeds before referred to. The proposition, of course, will not be disputed that a vendee who assumes a mortgage or debt due from his vendor becomes the principal debtor and his vendor the surety. Preas therefore became Boyd's surety for the debt, and Boyd became the surety of the Carnegie Land Co. for the same
143 debt. This being so, when Preas was forced to pay any portion of the debt he or his creditors may set it up against the principal debtor, the land Co., and, of course, Boyd, the surety of the land Co. may compel the company to make payment out of its assets. So, if the principal debtor has become insolvent, the surety may sustain such bill before paying the debt. These propositions, we take it, need no citation of authorities to support them.

It results from this that, nothing further appearing in the holding of his honor, his decree was erroneous.

It is said that the last undertaking of Boyd and Preas as surety of the land Co. was after the insolvency of the land Co. This is true. But the purchase of the property by the land Co. under the original decree of King against it, Boyd, and Preas was made obviously to preserve the property from what was then conceived to be a sacrifice, and it is reasonably to be inferred that its purchase was to be sanctioned or acquiesced in by all the creditors, at least the property thus purchased went into the assets of the Carnegie Land Co. for distribution in this cause, and the proceeds thereof are being administered for the benefit of the creditors in this cause.

We think these claims should be permitted to participate in the distribution of the assets, but King cannot be permitted to participate as a Tennessee creditor by virtue of the fact that Preas, one of the sureties of the land Co., was a resident of Tennessee.

Another contention made in the case is that the debt of the American National Bank of Nashville is not entitled to stand on the footing of a debt of a resident creditor. It appears that the debt of this bank consists of some notes endorsed to it by a mercantile firm, but there is no evidence in the record as to the resi-
144 dence of the firm that endorsed the notes to the bank; whether it and its members were residents of Tennessee or some other State, the record wholly fails to disclose. In short, the record is absolutely silent as to that point. The question is: "Is the American national bank, confessedly a resident creditor, entitled to the preference given by the statute with respect to its debt assigned to it by a party whose residence is not disclosed in the record?" The majority of the court hold that before this bank is entitled to put this debt on the preferential footing given by the statute it was

its duty to make it affirmatively appear that it had not been assigned to it by a non-resident of the State.

But as the case seems to have been tried and decided without special reference to that part, we think, under the remand to the chancery court, that the matter should be opened and the bank be permitted to show, if such be the fact, that the firm assigning the notes to it were residents of this State.

The result is that we hold that this debt is not entitled to be classed with the debts of residents creditors and allowed the preference secured to such debts by the statute as the record stands.

The above, we believe, disposes of all the questions in this cause.

The decree of the chancellor, modified as indicated in this opinion, will be affirmed, and the cause will be remanded to the court below for final execution of the decree of this court. The costs of the appeal will be paid by the parties failing to sustain their appeal, as indicated in this opinion.

S. F. WILSON, *J.*

We concur.

M. M. NEIL,
R. M. BARTON, JR., *Judges.*

145 Court of Chancery Appeals, at Knoxville.

TUESDAY, *September 15th*, 1897.

Court met pursant to adjournment—present and presiding, the Honorable R. M. Barton, S. F. Wilson, and M. M. Neil—when the following proceedings were had, to wit:

THE AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

These consolidated causes were heard before the court of chancery appeals September 11th, 1897, and on previous day of court on the transcript of the record from the chancery court of Washington county, held at Johnson City, the assignments of error filed by the appellants, and the briefs and argument of counsel, and after full consideration of the same the court adjudged and decrees as follows:

First. That the act of 1877, ch. 31, and the acts amendatory thereof are constitutional, and that therefore the creditors of the Carnegie Land Company, residents of Tennessee and before the court in this cause and whose debts are contracted before said land company placed mortgages upon its properties and had them registered, are entitled to priority of judgment out of its assets. The decree of the chancellor so holding is affirmed.

The preference given by the statute of act aforesaid to residents creditors extends to interest and protest fees accruing in this debt, although accruing after the registration of mortgages upon its property by the land Co., where their debts were contracted before the mortgages, but it does not extend to attorneys' fees accruing in the

effort to collect said debt, although such attorney fees were
146 contracted for on the face of the notes as contracts evidencing their debts. The holding of the chancellor that the preference given by the statute extended to and covered such counsel fees is reversed.

Second. That the decree of the United States circuit court *court* at Knoxville, Tennessee, was and is *res adjudicata* as to all matters and questions adjudicated by it, as shown in the record, and the holding of the chancellor that it was not is reversed.

The result is that A. R. Wing, assignee and receiver of the Carnegie Iron Co. under the appointment of the United States circuit court, — allowed, but his claim will not stand on the footing of the debt of a resident creditor, and therefore entitled to the preference given to resident creditors. The appeal of said A. R. Wing, assignee, etc., and his errors assigned to the extent above indicated are sustained; in other respects they are overruled.

Third. The decree of the chancellor in so far as it adjudge- *that* all the costs and counsel fees accruing in this case in behalf of complainants in the original bill is erroneous and is reversed. No counsel fee to counsel of complainant in the original bill nor other counsel fees will be paid out of the proceeds of the mortgaged property of the land company except in so far as said proceeds are applicable under the preference act of 1877, chapter 31, to the debts of resident creditors of Tennessee. Said proceeds will, of course, be proportion al-y liable for the court costs incident *ot* the conversion of the property under mortgage by sale in this cause and to the fees of the respective counsel representing creditors entitled to the proceeds.

Fourth. The chancellor's decree in respect to the claim of Maden & wife and their assignee is erroneous and is reversed.

Said claim, as stated in their petition and in the master's report, should have been allowed, and it is so ordered and decreed.
147 Fifth. The decree of the chancellor in respect to the King Preas & Boyd claim as presented in the record is erroneous and is reversed; said claim should have been allowed and it is so ordered and decreed, but the claim in so far as it is rested upon any payment made by Preas will not be entitled to stand on the footing of a Tennessee debt entitled to preference.

Sixth. The American national bank, doing business at Nashville, Tenn., is a Tennessee corporation in the sense of the act of 1877, chapter 31st, but its debt or claim sued on in this case was assigned to it by the firm of Morton, Scott & Robertson, and the residence of said firm not disclosed in the record.

The court holds and decrees that as a matter of law a resident creditor holding a debt assigned to it by a non-resident creditor of the land company is not entitled as to the debt so assigned to him to the preference given by the act, and that before such debt can be given the preference secured by the act it must be made to appear that the assignor of the debt was a resident of the State at the date of its assignment.

But *as* the chancellor's holding that this debt was entitled to the

preference given by the act by virtue of the fact that its assignee was a resident of the State may have led it to believe and act thereon that it was not necessary to show the resident of the assignor of the debt.

The question will be open on the remand of this cause to the court below to the end that the bank may show, if such be the fact, that said firm assigning the notes sued on by it was a resident firm of this State when the assignment to it of the notes was made, and if — he made to appear that it was then a resident of the State the debt as fixed by the decree of the chancellor will be given
148 preference as decreed by the chancellor.

The bank will pay all costs incident to the reference to ascertain the fact above indicated.

Except as indicated, *in* this decree of the chancellor is in all other respects affirmed.

This cause is remanded to the chancery court of Washington county for all such other and further proceedings in conformity to the opinion of this court as may be necessary to effectuate the decree of the chancellor as modified by the decree of this court. The cost of the appeal will be paid in equal parts by appellants The Travellers' Insurance Company, A. R. Wing, assignee, and Receiver John I. Cox, Carhart and Sully and complainants in the original bill and their respective securities, but the costs hereby taxed against the complainants in the original bill may be paid out of the fund going to them and creditors in their class as fixed in the decree of the chancellor and of this court.

The court filed their written opinion in this cause, which is made part of the record.

* * * * * * *

149 2. *Constitution of the United States.*

Appellant further assigns as error in the decree of the court of chancery appeals that they should have held that said act of 1877, before referred to, violate the Constitution of the United States, especially in that section of the same which provides for priority of Tennessee creditors over foreign creditors and citizens in the distribution of the assets of such foreign corporation doing business in this State. The sections of the Constitution violated are section 2 of article IV of the Constitution of the United States, which is as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

And section 1 of article XIV of the amendments to the Constitution of the United States, and the latter part of the same, which is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This question has been determined adverse to the contention of appellant by this court in the case of Embreville Land & Freehold Company, in an oral opinion, and the constitutional question in the same case is now pending before the Supreme Court of the United States, and will doubtless be decided prior to the hearing of this cause in this court. In case it is not passed on, we desire the
150 court to pass upon this question in this cause, so that in the event the Supreme Court of the United States declares said provision of said act unconstitutional appellant may take advantage of the same in the Supreme Court of the United States. For the reason that the question has been expressly determined by this court, we forbear to make any argument upon the same here.

* * * * * * *

151 Supreme Court of Tennessee, at Knoxville, September Term, 1898.

SATURDAY, *November 19th*, 1899.

Court met pursuant to adjournment.

Present and presiding: The honorable chief justice, D. L. Snodgrass, and the honorable associate justices, W. C. Caldwell, Jno. S. Wilkes, W. K. McAllister, and W. D. Beard.

The minutes of yesterday were read and signed, when the following proceedings were had, to wit:

AMERICAN NATIONAL BANK ET ALS. *vs.* CARNEGIE LAND COMPANY ET AL. and WILBERFORCE SULLY, Trustee, ET ALS. *vs.* CARNEGIE LAND COMPANY ET ALS.	Modified & Remanded.

This cause was this day heard before the honorable supreme court of Tennessee upon the transcript of the record from the chancery court at Johnson City, and the written opinion and finding of the court of chancery appeals, and the several assignments of errors and replies filed thereto, when the court, after hearing argument and considering the cause, *the court* is of opinion and decrees:

I. That the act — 1877, ch. 31, of the General Assembly of Tennessee is constitutional and not subject to any successful attack as being in violation of constitution of Tennessee, art. 2, sec. 17.

II. That said act, or any part thereof, in not in contravention or violation of the Constitution of the Unites States, art. 5, sec. 2, or of art. 14, sec. 1, of the amendments to said Constitution.

To the ruling respecting the said act not being in violation of the Constitution of the United States, as aforesaid, the fol-
152 lowing parties save their exception severally, to wit, Travelers' Insurance Company, Wilberforce Sully, trustee, and A. B. Carhart and A. R. Wing, assignee of Carnegie Iron Company, as

to the judgment of the United States circuit court at Knoxville of $129.00 against Carnegie Land Company *et als.*

III. In respect to the claim of E. & N. Manufacturing Company, it is decreed that the Travelers' Insurance Company purchased the furniture sold by said company subject to the title retained in the vendor company (E. & N. Manufacturing Company) and is not entitled to have the claim due to said vendor, or any part thereof, paid out of the $25,000.00 bid for the hotel property, including said furniture. The right of the Travelers' Insurance Company is that of the vendee, Carnegie Land Company, and — Travelers' Insurance Company may hold said furniture only on terms of paying at its election the amount due to the vendor company secured by the retention of title in said furniture, to wit, $1,376.87 and interest. On the event the purchaser, Travelers' Insurance Company, does not elect to pay said claim, the chancery court of Johnson City may, on remandment, permit the E. & N. Manufacturing Company's assignee to enforce the rights incident to the title retained by having said furniture sold as provided by law in such cases.

4. In respect of the matter of the claim of Travelers' Insurance Company as the transferee and owner of the claim of P. Fleming & Co., the court decrees that the Travelers' Insurance Company, as purchaser, is not entitled to credit the $25,000.00 bid by it at the clerk & master's sale with the amount due it on said Fleming & Co. claim. The purchase being subject to said claim, that claim became satisfied or extinguished in the hands of the Travelers' Insurance Company.

5. Frame King claims the court of chancery appeals was
153 in error in depriving Jas. H. Preas of the right to share in the assets of this company to the extent of his payments, with interest, in his suretyship for the Carnegie Land Company to Frame King, such payments made as shown in the record, such payments to be prorated upon as of date of suretyship, Dec. 23, 1891, and, by substitution, Frame King is entitled to the fund going to Jas. H. Preas, having impounded the same, but the court of appeals are correct in disallowing the claim of Frame King growing out of the claim of suretyship on the part of R. S. Boyd, and said King and Boyd are entitled to nothing out of the funds in this cause on account of Boyd's suretyship, the latter having paid nothing on his obligations as surety, and said Boyd is not entitled to a judgment in this cause against defendant company.

6. A lien is declared, on motion of the firm of Shields and Mountcastle, upon the recovery of Wilberforce & Sully, trustee, and of A. B. Carhart, in this cause, to secure said solicitors in the payment of reasonable fees for services in this cause.

A lien is declared, upon motion, in favor of the solicitors of the several recovering complainants and petitioners, upon the recoveries of their respective clients in this cause, to secure them in the payment of reasonable fees.

6 A. *6 A.* The decree of the court of chancery appeals is so far modified as to provide that the taxes due to the State, county, and municipality, so far as they are adjudged to be liens, be paid out of

the funds arising from the tracts or portions of realty on which they were assessed.

7. In all other respects the decree of the court of chancery appeals is affirmed, and the cause is remanded by the court to the chancery court at Johnson City for the further execution of this decree.

154 8. The costs of the cause below and on appeal will be paid as decreed by the court of chancery appeals, except that John I. Cox, receiver of First National Bank of Johnson City, will only pay one-ninth of said costs.

155 Filed Oct. 5th, 1896.

ALEX. McMILLAN, *Clerk.*

AMERICAN NATIONAL BANK ET AL. *vs.* CARNEGIE LAND COMPANY ET AL. } From the Chancery Court at Johnson City.

& consolidated causes.

Assignment of Errors for the Travellers' Insurance Company.

I.

The chancellor decreed that because the Carnegie Land Company was a foreign corporation, doing business in Tennessee under the statutes fixing the terms upon which such corporations may do business in this State, that it could not make a deed of general assignment, distributing its assets among all its creditors equally, and that the deed of June 3rd, 1893, "was fraudulent in law and void." Tr., vol. 5, p. 1629.

This was error on at least two grounds:

1*st*. The act of the legislature, chapter 31, Acts of 1877, declaring the terms on which foreign corporations may carry on their business in this State, is repugnant to sec. 17 of art. 2 of the constitution of Tennessee, which provides, "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The question as to the validity or invalidity of the act of 1877 must be determined by examination of the title to the act and the different provisions contained in said act, when measured by section 17 of article 2 of the constitution of Tennessee.

"The caption of an act is a necessary and material part of every act of the legislature. It should indicate to the reader the
156 nature of the *one subject-matter* embraced in the law. 6th Pick., 726 p.

So very important was this matter in the minds of the framers of the constitution of our State that they adopted the following language on this subject: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The subject embraced in the title of the act of 1877, ch. 31, is to

declare the *terms* on which "foreign corporations" organized for mining or manufacturing purposes may carry on their business and purchase, hold, and convey real and personal property in this State.

Corporations organized in foreign States coming to this State to do business do not bring the legal entity into Tennessee, but send their agents or representatives, the entity remaining where it is created.

The purpose, as declared in the caption of ch. 31, Acts of 1877, was to declare the terms on which these foreign corporations might come into Tennessee and do what their foreign charter authorized them to do. It is insisted that if the legislature attempted in said act to *la*gislate upon any other subject than that indicated in the title, viz., to declare the *terms* on which they can carry on their business in this State, that *them* the act is void.

2ns Pick., page 272.
3rd " " 109.
4th Lea, " 1–12.
9th " " 374–380.
12th " " 180–189.
15th " " 708.

Sections 6 authorizes foreign corporations complying with the requirements of the act to construct and maintain roads,
157 bridges, canals, tramways, telegraph lines, and build railroads wheresoever they may see fit.

Section 8 of said act attempts to authorize such corporations to build towns, villages, and settlements for the use and residence of their employees "and others;" to establish such regulations for the government of the same as shall not be inconsistent with the laws of this State.

The latter — of section 8 prohibits (except within the boundaries of an incorporated town) any one from distilling liquor or intoxicating drink of any kind, except for medicinal uses, within a radius of five miles of any quarry or of any furnace, rolling mill, foundry, or factory of any kind, established or purchased by any corporation, so long as such mine, quarry, furnace, rolling mill, foundry, or factory is actually worked or held for purposes of being worked or whilst under construction, etc.

Sec. 8 also creates a new criminal offense for which the offender may be fined from $100 to $250 and be imprisoned at the discretion of the court.

Sec. 8 also attempts to amend ch. 112, Acts of 1871.

In this connection the court's attention is called to a certain provision in the charter of the Carnegie Land Company granted to it by the General Assembly of the State of Virginia, Acts of 1889–'90, page 246, being chapter 173.

The provision in said charter to which the court's attention is called is in these words: "That said company should have no power to construct a railroad, turnpike, or canal."

The Tennessee act, under which this corporation entered the

State, authorizes them to construct and maintain railroads between their mines and their places of manufacture and for purposes of inlet and outlet to or from any railroad now or hereafter to
158 be constructed. Said act also authorizes them to construct canal.

Under the Tennessee act they might establish their place of manufacturing at Memphis, and they might mine their ores in Johnson City, Tennessee, and the company would be authorized to build a railroad between these two points; or, if they choose rather to purchase their mining property in Johnson City, Tennessee, and desired to ship their ore to Birmingham, Ala., then they could cut a canal across Tennessee until they would reach the Alabama line.

*[If ch. 31, Acts of 1877, is the law of Tennessee, a number of gentlemen might organize themselves into a corporation in the State of Massachusetts for the purpose of manufacturing "rye whiskey," and all that they would have to do would be to "file in the office of the secretary of state (Tennessee) a copy of its charter *or articles of association*, certified in the manner directed by law for the authentication of the statutes of the State or county under whose laws such corporation is chartered or organized, and cause an abstract of the same to be recorded in the office of the register of each county in which such corporation proposes to carry on its business or to acquire any land."

When this foreign corporation has complied with the act, as above indicated, it could go to manufacturing rye whiskey in large or small quantities, and within a radius of five miles no one else would be permitted to distill, have, make, sell, bargain, or give away any spirituous liquor or intoxicating drinks of any kind without subjecting themselves to imprisonment and pay a fine of from $100 to $250.]

*The paragraph in red line is not insisted upon.

H. H. CARR.

159 If the minister of God gave to his communicants in the ordinance of the holy sacrament a sip of wine which if shown to be an intoxicating drink, he would be liable to be fined from $100 to $250, and imprisoned at the discretion of the court, even though that imprisonment might reach over a period of years.

Again, the act of 1877 authorizes these foreign corporations to build towns, villages, and settlements for their employees *and others*. This expression, "and others," must mean other people, and we insist that that is a separate and distinct subject from the matter embraced in the title.

In the case of Ragio *vs.* The State, reported in 2nd Pickle, 272, the question arose over chapter 106, Acts of 1887. The title to the act was "An act making it a misdemeanor to carry on barbering on Sunday." The language used in the body of the act, "that it shall be a misdemeanor for any one engaged in the business of a barber to shave, shampoo, cut hair, or keep open their bath-room on Sunday," was declared to be obnoxious to section 17 of art. 2 of the

constitution because it embraced two distinct subjects, to wit, barbering and bathing.

Certainly the building of towns for others and establishing municipal governments therein is as much a distinct subject from mining and manufacturing as is "barbering and bathing."

Again the constitution provides:

"No corporation shall be created, or its powers increased, or diminished by special laws, but the General Assembly shall provide by general laws, for the organization of all corporations hereafter created, which laws may at any time, be altered or repealed; and no such alterations or repeals shall interfere with, or divest rights, which have become vested."

Constitution of Tennessee, article IX, last clause of sec. 8.

160 That sections 6 & 8 of ch. 31, Acts of 1877, attempt to enlarge or increase the powers of foreign corporations goes without controversy.

See Acts of 1877, chapter 31, sec. 6 & 8.

Again, the constitution provides:

"All acts which repeal, revive, or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived, or amended."

Art. 2, sec. 17.

The latter part of section 8, Act of 1877, chapter 31, provides: All the provisions and restrictions of chapter 112 of the Acts of the Legislature of Tennessee, 1871, passed 14th December, 1871, are hereby declared applicable to all corporations organized under this act, and all persons violating any of the provisions of this section of this act shall be punished as declared in said act of 1871.

There is not a wor*k* in the caption "or otherwise" which undertakes to state "the title or substance" of the act sought to be incorporated into the act of 1877.

And again, the Constitution of the United States, sec. 2, articles IV, provides: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the United States."

The Act of 1877, chp. 31, is in violation of these constitutional provisions in this: If a citizen of Tennessee and also a citizen of a neighboring State deal with these corporations and extend credit to them, the citizen of the foreign State has not the privilege or right, under the law, of collecting his debt or *or* even securing the

161 same until after the Tennessee creditor's debt is paid. The act abridges the rights of commerce, and is therefore repugnant to the above provisions.

II.

The Carnegie Land Company, on the 3rd day of June, 1893, made a deed of general assignment for the benefit of all its creditors. Tr., vol. —, p. —.

The deed, having been executed as required by law, must be *reor-*

quized as the law governing the assets of the maker until set aside by proper proceedings in a court of competent jurisdiction.

There is no pleading in the record attacking the deed of assignment, and that part of the chancellor's decree is erroneous on this ground. See original bill, Tr., vol. —, p. —.

Any one dissatisfied with said deed of assignment and unwilling to accept any benefits thereunder must actively disaffirm the deed or the law presumes an affirmance and an acceptance under the deed by them. 3rd Head, 332; 3rd Hump., 442; 4th Cald., 626–'31.

A party accepting the provisions of a deed of trust for his benefit thereby affirms the instrument *in toto*, and is estopped from impeaching any of its provisions for himself *et al.* 7th Heisk., 612.

Only upon issues between antagonizing parties and proof upon these issues can courts make decrees.

Gibson's suit in chancery, sec. 167.
" " " " 405 & note.

The right to object to the deed of general assignment in a case like the one at bar is a personal privilege to each creditor whose debt was contracted prior to the execution of the deed of trust to the Travelers' Insurance Company, and who was also a resident
162 of Tennessee, and must be exercised by the creditor himself and might be waived by the creditor. It is insisted that, unless especially pleaded, the court would be bound to find that the creditor elected to waive his personal privilege.

In the case at bar there is no issue to try the validity of the deed of general assignment made by the Carnegie Land Company. Because of all the foregoing the chancellor's decree above referred to is erroneous.

II.

The chancellor's decree confirming the sale of the Carnegie Hotel property to the Travelers' Insurance Company was erroneous.

Tr., vol. 2, p. 401–'2. See master's report, vol. 2, p. 397, par. 5.

The master recites in his said report: "I then offered for sale the hotel property, being the lots described in the record known as the Carnegie Hotel property, with hotel thereon and furniture therein, offering the same for sale as a whole, and the Travelers' Insurance Company of Hartford, Connecticut, through its agents and attorney, H. H. Carr, became the purchaser thereof at the price of twenty-five thousand dollars, but being the highest, best, and last bid therefor; but no cash was paid into the office of the clerk & master or note given, the said purchaser proposing to credit its debt secured by the deed of trust on said hotel property and furniture with the amount of its said bid; and it being represented as such mode of settlement it was understood would be or was agreed to by counsel of the various parties interested in the cause, the master reports such sale to the court for such approval of counsel and confirmation by the court."

The sale was made during term time, to wit, on December 2nd,

1895; was reported by the master Dec. 4th. 1895, and the decree confirming the sale was Dec. 9th, 1895.

Tr., vol. 2, p. 394.

163 The master or chancellor had the right to reject the bid made by the Travellers' Insurance Company and order a new sale. The chancellor had no power to confirm any other sale than that made by the master, and the decree wherein he attempted to make a different sale was erroneous.

III.

The chancellor decreed with reference to the Carnegie Hotel property that the purchaser of the property so mortgaged by the Travelers' Insurance Company at the sale by the master took the same subject to the equities, liens, and titles retained, and that in the settlement of the purchase price it can only apply as a credit on its debt such part as remains after discharging its proportions of the costs and expenses of this suit and paying specific liens in full and its proportion of the then existing indebtedness for the land Co. due residents of Tennessee.

This was error.

When the chancellor ordered the property sold he did not direct that it should be so sold.

Tr., vol. 2, p. 317.

When the insurance company bid on the property it was with the understanding that they were buying the entire property.

Tr., vol. 2, p. 398.

The order of sale says: "The master will sell the Hotel Carnegie property, mentioned and described in the deed of trust, to the Travelers' Insurance Company separately and upon the terms and conditions prescribed in said deed of trust.

Tr., vol. 2, p. 317, trust deed.

This was the authority for the master to make said sale, and was notice to the public, and especially to all who wished to bid, what was to be sold and what the successful bidder would get at
164 the sale.

IV.

The chancellor's decree holding that the fund arising from the sale of the hotel property should be onerated with a part of the general expenses of this suit, to wit, a *pro rata* share of the fees of Deadrick & Epps, Reeves & Baxter, for filing the original bill in this cause;

The fees of Kirkpatrick, Williams & Bowman, attorneys for John W. Cure, assignee; the expenses and compensation of John W. Cure as assignee, the interest accumulated on debts since the execution of the trust deed to Travelers' Insurance Company, the protest fees, and the cost of this litigation, is erroneous.

Tr., vol. 5, p. 1629.

It was error for the chancellor to overrule Travelers' Insurance Co.'s exceptions to the master's report Nos. 2, 3, 4, 14, & 15.

For exceptions, see Tr., vol. 6, pp. 1894, 1895, 1897, 1901, 1902, 1903, respectively.

The decree overruling these exceptions will be found in vol. 6, pp. 1954–1962.

The chancellor should have decreed that no part of the fees of Deadrick & Epps and Reeves and Baxter, attorneys who filed the original bill; Kirkpatrick, Williams & Bowman, who represented Cure, assignee; also the expenses and salary of John W. Cure, assignee; the interest and protest fees, and the costs of the cause should have been taken out of the fund arising from the sale of the hotel property.

1. It could not be said truthfully that these attorneys' fees and costs, protest fees, the cost of this litigation were debts, engagements, or contracts which were made or owing by the Carnegie Land Company at the time of the execution of the deed of trust to the
165 Travellers' Insurance Company.

Acts of 1877, ch. 31, sec. 6.

2. Exceptor can find no case where counsel fees for bringing general creditors' bill or counsel fee for the assignee of an insolvent have been held to be debts against the failing debtor. On the contrary, the courts have allowed fees to counsel representing general creditors' proceedings and counsel representing assignee, not as debts against the failing debtor, but as charges against the assets, on the ground that, the services paid for having protected the rights and interests of the beneficiaries of the fund, in the progress of the litigation it was necessary for each creditor to employ counsel to look after his individual debt. The creditor alone was responsible for the compensation of his attorneys; and yet the chancellor holds that out of the recovery due Travelers' Insurance Company must be taken "the proportionate share of fees for counsel who filed the original bill in this cause, counsel for Cure, and all sorts of suits and services in this suit."

Tr., vol. 5, p. 1635, par. 3.

The decree in this particular is inequitable, unconscionable, and unjust in the extreme.

V.

The Carnegie Land Company owned $100,000 bonds issued by the Carnegie Iron Co. The land company put a number of these bonds up as collaterals to secure certain debts it owed.

The debts were as follows and the collaterals were as follows:

One debt now in the name of W. G. Mathes, receiver.... $3,820.34
Collateral.... ..... $3,000.00

Tr., vol. 6, p. 1936.

166 First National Bank of Chattanooga..... 5,033.58
Collateral..... 7,000.00

Tr., vol. 6, p. 1929.

First National Bank of Johnson City.....
Tr., 6, p. —.

Edgefield & Nashville Manufacturing Co..... 921.00
Collateral..... 8,000.00
Tr., vol. 6, p. 1929.

Jonesboro Banking & Trust Co..... 1,739.37
Collateral..... 5,000.00
Tr., vol. 6, p. 1937.

S. C. Williams, owner, and Page Dennis, debt..... 474.37
Collateral..... 1,000.00
Tr., vol. —, p. —.

American national bank..... 4,778.93
Collateral..... 6,000.00
Tr., vol. 6, p. 1925.

H. S. Chamberlain..... 4,058.19
Collateral..... 16,000.00
Tr., vol. 6, p. 1937.

All of these parties intervened in this cause and their debts were allowed by the chancellor, and yet they have withheld all the collaterals given them by the Carnegie Land Company, amounting, with interest, to nearly $50,000.00.

The chancellor erred in holding that these creditors could withhold their collaterals and yet present their claims and have them satisfied out of the funds in this cause.

Tr., vol. 5, p. 1400, error assigned.
Tr., vol. 5, p. 1630, par. two.

167 The chancellor should have held that as between the creditors those *two* held collaterals should be charged with the value of said collaterals or be forced to produce the same to be distributed herein as a part of the assets of this insolvent proceeding.

The chancellor erred in holding that the fund arising from the sale of all the property belonging to the Carnegie Land Co. should be onerated with the payment of all the debts contracted prior to Nov. 3, 1893, the date of the deed of trust given to secure the loan of $30,000.00.

Tr., vol. —, p. —.

The chancellor should have held that the creditors whose debts antedated Nov. 3rd, 1891, must look, in the first instance, to the property not included in the deed of trust to secure the Travelers' Insurance Company's loan.

Jones *vs.* Maney, 7th Lea, p. 341–348.
Cannon *vs.* Hudson, 6th Houst., p. 21 (Del.).
Milmine *vs.* Bass, 29th Federal Reporter, 632.
Black on Judgments, vol. 1, sec. 400.

Robinson's appeal, 117 Pa. St., 628, a case where the owner of a tract of land gave a judgment to A and then a mortgage to B; subsequently the owner acquired a second tract on which A, by a revival of his judgment, obtained a first lien; subsequently the owner mortgaged this second tract to C. Upon a distribution of the proceeds of both tracts it was held that C having had record notice of the other lien, B, under his superior equity, could require that the proceeds of the second tract should be applied to A's judgment in relief of his own lien upon the first. The court said: "This equity, we have said, was against the debtor, and it is equally such against his subsequent mortgage creditors with notice, who can have no greater rights than the debtor had at the time the mortgage
168 was given."

This equity existed if favor of the appellants before the appellees acquired their lien "*prior in tempore, potior in jure.*" "The appellee- must be considered to have taken their mortgage, subject to the prior equity of the appellants.

In Delaware and Hudson Canal Co.'s appeal, 38 Pa. St., 612, a mortgagor had other lands than those mortgaged, which, including the mortgage- premises, were bound by four earlier judgments. Subsequent to the mortgage were other judgments, which were liens upon all lands. Upon a distribution of the proceeds of a sale of all the lands, the court subrogated the mortgagee to the rights of the senior judgment creditors in the lands not covered by the mortgage. It was distinctly held that the judgment creditors subsequent to the mortgage had no rights superior to those of their debtor."

The same principal is recognized in Hastings' case, 10th Watts, Pa., 303.

The general principal is explained in a note to Aldrich *vs.* Cooper, Second Leading Cases in Equity, 266, as follows: The equity has its root in the obligation of the debtor, but is also an equity among the creditors that each shall, when it can be done without loss or inconvenience, so use his right that all may, as far as the circumstances admit, be satisfied in the order in which their lien- severally accrued.

Lewis on Trusts, text-book series, Blackstone Publishing Company, vol. 2, top paging 886–890.

VI.

The chancellor erred in allowing the claim of H. C. Jarvis as against the Travelers' Insurance Company.

169 See vol. 2, bill of Carnegie Land Company *vs.* H. C. Jarvis (stamp paging 494 and ink pag- 2); also cross-bill of H. C. Jarvis, vol. 2, stamp page 504, ink page 12, *a* and especially prayer to the cross bill, stamp 511, ink paging 19.

Said pleadings show clearly that this was not a debt against the Carnegie Land Company at the time the mortgage to the Travelers' Insurance Company was executed.

2. Jarvis, in his cross-bill, only sued for $575.00, and yet a decre was granted him for the sum of $2,236.50.

Tr., vol. 2, stamp paging 525, ink paging 34.

The record shows the cause was appealed to the supreme court b the Carnegie Land Company, and afterwards the appeal was di missed and an agreed decree was entered in favor of Jarvis for th sum of $1,800.00.

Tr., vol. 2, stamp paging 606, ink page 119.

It is insisted that that decree at most could only bind the Ca negie Land Co. and Jarvis. It was entered on Sept. 18, 1895, an this exceptor was not a party to that cause, and was therefore no bound by any decree entered therein.

Again, the Carnegie Land Company had more than two yea previous thereto made a general assignment, and all of its affai were being wound up under this general creditors' proceedings.

Jarvis filed his petition in this case, and exhibited with his pet tion the record in the cause of the Carnegie Land Company *vs.* hi self. His rights to a decree in this case were denied, and the onu was upon him to establish his claim, and exceptor insists that he h utterly failed to do so.

H. H. CARR,
Sol. for Travelers' Insurance Company.

170 Filed October 5th, 1896.

ALEX. McMILLAN, *Clerk.*

Complainants' Assignments of Errors.

AMERICAN NATIONAL BANK ET ALS.
vs.
CARNEGIE LAND COMPANY ET ALS.

In Supreme Court, at Knoxville, Tenn.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

Assignment of errors by complainants in the original bill.

On the trial of this cause, among other things, the court decree as follows:

The court is of opinion and finds and decrees that the proof su tains the allegation that Carhart is a *bona fide* holder of the bon "sued on" pledged to him and Mrs. Myton by Wilberforce Sull treasurer of defendant land Co., and that the hypothecation of sa bonds was not unlawful, and that A. B. Carhart is entitled to r cover thereon, but subject to priorities fixed by law and as here declared. It being suggested that the assignee's report shows th A. B. Carhart owes the Carnegie Land Company a sum that shou

be set off against the sum due him, the master will inquire
171 and report upon this matter.

We respectfully submit that the foregoing was error because:

I.

Said bonds were never in fact or in law hypothecated. The facts as they appear in the record are substantially as follows:

A. B. Carhart, complainant in the original bill consolidated herewith, claims that there is due him 85 first-mortgage bonds of the defendant Carnegie Land Company, together with the interest coupons thereto attached to date, amounting to $102,782.25, and that said amount constitutes a first and prior lien on the property of the defendant company embraced and covered by a mortgage made to secure its bonds and interest.

See original bill of Carhart & Sully and mortgage, Tr., p. 237 & 259.

The master in passing upon this claim reported adversely thereon, and in his report gives a concise statement of the fact connected with the alleged issuing hypothecation of these bonds.

The statement of fact is in substance as follows:

But the negotiation of said bonds by the company to the said Carhart and his ownership thereof are denied by answers, and the master is of opinion under all the facts and circumstances developed in the record and proof that said claim- for the amount of said bonds were issued under the authority of stockholders' and directors' meetings, the latter being held on Jan. 14th, 1893, and were placed in the hands of Wilberforce Sully, of New York, treasurer of the company, to be countersigne- by said Sully, as trustee, and to be sold for not less than 60c. on the $1.00. The bonds were not completed by his signature until the latter part of February, nor the mortgage registered till Feb. 10th, 1893, and were not sold to said
Carhart or negotiated to him for value as a *bona fide* pur-
172 chaser, but pledged to him as collateral security for the antecedent debts of himself and Mrs. Myton hereinbefore set out. This appears to have been done, not by the board of directors, but by said Sully as treasurer, about March 1st, 1893, and on looking to Exhibit "B" to petition of said Carhart and Mrs. Myton, being the note to said Carhart of that date, it seems to have been approved by J. T. Wilder, president of the company, *only* and not by any other directors, and not to be the act of the board of *the* directors, and was without the knowledge of the secretary of the company. It purports to pledge not only the 85 bonds, but 290 bonds, and evidently contemplated the making of advancements to the company which never were made; and, moreover, the receipt of said Sully thereon for part of the bonds and modification of the contract in the same was not put there until Sept., 1893, three months after the general assignment made by the company, of which he and Carhart, it appears, had knowledge, and when the company went into a state of liquidation it was a revocation of his authority to act for it or deal with its assets as an agent or officer; nor does the

relationship of the parties or their relations to the company give confidence in the transaction. Carhart and Mrs. Myton, it appears, were both stockholders in the company and had opportunity for knowing, if not chargeable with actual notice, of the limitation upon the sale of the bonds, Mrs. Myton being a cousin of Mr. Sully ans Mr. Carhart her nephew; and, strange to say, *if* view of the character of the contract, one of them was then a married woman and the other a minor about 20 years old. Said contract attempts to delegate authority to sell or repledge, and in which latter respect it would be void.

And if said contract were valid at all and the bonds were pledged as collateral to said Carhart for the benefit of himself and
173 other creditors, a purchase of them by him at his own sale would not, as the master believes, change his manner of holding them, or make him absolute owner of them, free from a fiduciary relation, especially after notice of the insolvency of the corporation, such sale and purchase by him being made on the 27th day of November, 1894, just one year after the filing of the bill in this case, over 11 months after the order had been made sustaining the bill as a creditors' bill, and requiring all claims to be filed and prosecuted in this court and cause, and enjoining creditors by publication from other proceedings. Each and every facts stated by the master hereinbefore is fully sustained by the record and *are* beyond controversy.

See O. bill of American National Bank *et al.*, Tr., pp. 2–13, and assignment and schedule, exhibit thereto, Tr., *pp.* 11–17, vol. 4.

Ans. of Carnegie Land Company to same, Tr., *pp.* 68.

Petition of Mrs. Myton & A. B. Carhart, and Exhibit "B" thereto, Tr., pp. 361 and 367.

Original bill of Wilberforce Sully, Tr., *pp.* 237, and Exhibit "A" thereto, Tr., pp. 259, 260.

Ans. Travelers' Ins. Co., Tr., *pp.* 326.

Ans. Am. Nat. Bank *et al.*, Tr., *pp.* 321.

Minutes of directors' meeting of Jan. 14th, 1893, see Tr., p. 387, vol. 2, *ppp.* 1348–1353.

Dep. of J. W. Cure, filed Feb. 23, 1895, Tr., pp. 177–206.

Dep. of J. W. Cure, filed Apr. 29th, 1896, Tr., p. 878–884.

Dep. of Wilberforce Sully, Tr., p. 787, and Exhibits A, G, H, N, & U, Tr., p. 259, 833, 835, 838, 844.

Dep. of A. B. Carhart, Tr., p. 846, and Exhibits 101, 102, 103, Tr., pp. 868, 869, 871.

Decree of Dec'r 20th, 1893, Tr., p. 78.

174 The official action of the board of directors of the Carnegie Land Company, under which it is or can be claimed that said bonds were authorized to be issued or hypothecated or in any way disposed of, was the meeting of said board held Jan. 14, 1893, at which the following action was taken:

"It is resolved by the directors that the Carnegie Land Company, in the exercise of the powers conferred upon it by its charter, hereby

authorize and direct the issuance of a series of bonds of the company in the aggregate amount of three hundred thousand dollars, to be prepared for issuance and delivery, signed by the president and countersigned by the secretary and treasurer of the company, authenticated by the signature of the trustee when issued.

The said bonds to bear date of the second day of January, 1893, and payable to Wilberforce Sully, as trustee, or bearer, on the first day of January, 1918, at his office in the city of New York. The principal and interest on said bonds shall be payable in gold coin of the United States, with interest coupons attached thereto, lithographed or engraved, with the names of the treasurer, for the payment of interest thereon from the second day of January, 1893, at the rate of 6% per annum, payable semi-annually in like gold coin at the office of the aforesaid trustee *of* the first day of January and July *fo* each year, and that a first mortgage or deed of trust be prepared and executed under the corporate seal of the said company, and signed by the president, treasurer, and secretary, conveying the estate, real, personal, and mixed, now owned or to *ne* hereafter acquired by the said company, so far as the same may be hereafter designated and approved by the board of directors, conveying also all the company's rights, privileges, and franchises, together with the incomes and revenues to Wilberforce Sully, as trustee, to secure the payment of each and all of the said bonds and
175 interest coupons, and that said mortgage or deed of trust, bonds and coupons shall be of such form and *c*ntain such suitable, customary, and general provisions as the president of said company before executing may approve."

" *When executed the bonds may be disposed of by sale in the market* upon such terms and conditions as may be authorized by the *board of directors.*"

See Tr., pp. 1348, 1353.

The last clause in the minutes of said meeting is as follows:

"On motion of J. W. Cure, seconded by S. C. Williams, it was voted that the bonds be offered for a price not less than sixty (60c.) on the dollar, being first offered to the stockholders *pro rata* for their holdings of stock, and if not taken by them upon 30 days' notice, the other stockholders may have the right to take the bonds *pro rata* with their holdings of stock."

There is nothing else in the directors' meetings that could authorize or that is claimed to authorize the issuance, sale, or hypothecation of said bonds.

See Tr., pp. 1353.

This was the last directors' meeting ever held by the Carnegie Land Company.

Carhart and Sully in their depositions claim to have derived authority for the hypothecation of the bonds from Gen. Wilder, president of the Carnegie Land Company, and that their transaction was approved by him.

See dep. of Sully, Tr., p. 789, 790, and dep. of Carhart, p. 846–'7–'8.

We respectfully submit that said bonds could only have been sold, hypothecated, or in any way disposed of by the action of the board of directors, and that said directors could only act in regular
176 meeting; that Carhart was charged with notice of limitations and restrictions upon authority of the officer or agent of the corporation.

See Thompson on Corporations, vol. 4, sec. 4875.
1 Lawson R. R. Spr., sec. 416; Green, Ultra Vires, p. 471, note.
1 Beach on Private Corp., sec. 224, *pp.* 337, & cases cited in notes 7; 2nd Am. E. Enc. Law, p. 946; 43 U. S., *pp.* 441.

Neither Sully, as treasurer, nor Wilder, as president, would have authority to pledge or hypothecate the bonds unless said authority was expressly conferred by the board of directors, speaking as a board in regular meeting.

See authorities above cited and 1 Cook on Stockholders, 1091 & 1595–'6, note.
Thompson on Corp., sec. 4880 & 4887.

The issuance of hypothecation of the bonds is the exercise of an extraordinary right and does not come within the ordinary duties or implied powers ascribed to officers of a corporation.

See Thompson on Corp., vol. 4, sec. 4870 and 4890.

Carhart cannot be an innocent holder for value, &c., because:
First. He took the bonds to secure a pre-existing debt.

See Carhart's dep., Tr., pp. 846–'7–'8, and Sully's dep., Tr., *pp.* 811, cross-int. 4, *pp.* 812.

Prior to this transaction a bank at Johnson City held the note of the Carnegie Land Company for about $12,000.00 and upon which Alfred Sully was security, and this is the debt that it is claimed Carhart advanced the money to meet or pay.

See dep. J. W. Cure, p. 11, 43, 45, and 46, pp. 883½ & 884.
See dep. Sully, Tr., pp. 811, 812, 813.
See dep. Carhart, Tr., pp. 846–'7.

177 Second. The bonds in this case, the mortgage, and the directors' meetings hereinbefore set out referred to each other, and Carhart and Sully would be charged with notice of the terms *of* said bonds and mortgage and of the action of said directors, and said mortgage expressly says that the bonds were to be disposed of by order of the board of directors.

See mortgage, Tr., pp. 259, 260.
See bonds, Tr., *pp.* 830.
See Beach on Private Corporations, vol. —, sec. 687.

Third. The face of the paper-writing which is offered *to* Carhart as evidence of this hypothecation (Exhibit "A" to Tr., p. 367, Carhart's petition) and claimed to have been executed at the time would

naturally suggest to any reasonably careful and prudent business man that the bonds offered him were in some way dishonored.

See said exhibit, Tr., *pp.* 367; Hunt *vs.* Sanford, 6 Yea., 393. 7 Heisk., 156; 6 Yea., 387; 2 Hum., 195; 2 *Hia.*, 5273.

Said paper shows the hypothecation of $290,000.00 cash. The amount secured is payable on demand, instantly. Full power is conferred upon Carhart to rehypothecate or pledge the entire $290,000 or any securities which may be substituted for them. He is authorized to sell said bonds at public or private sale at any time or times without advertisement or notice and with the right to become purchaser. No security is asked from him. He is authorized in effect by the contract the day following the alleged hypothecation to sell said bonds without redemption at private sale without notice to any one ans to become the purchaser at his own price.

We respectfully submit that this paper upon its face would suggest fraud and dishonesty to any fair-dealing man, and that he could not have stronger notice of dishonored paper than that suggested by the terms of said contract.

178 Usually clauses in a contract suggest fraud.
See Hum., 585.

Looking to the face of the paper last above referred to and in connection with the facts that these men must have known of the approaching collapse of the Carnegie Land Company, that they were bound to know or were charged with notice that the board of directors had not authorized the transaction which they contemplated, to the relationship of the parties, one a minor and the other a *feme covert*, and that Alfred Sully was endorser to a bank, as aforesaid, we respectfully submit that a case of fraud is not only suggested, but that in law and in fact fraud has been rarely so plainly and so strongly shown.

For the foregoing reasons we ask that the decree of the chancellor in reference to said mortgage and bonds be reversed and bill as to said Carhart and Sully be dismissed.

179 *In re* Claims of Edgefield Manufacturing Co., H. S. Chamberlain, Jonesboro Banking & Trust Co., and J. C. Cullen and First National Bank of Chattanooga.

Statement of Facts.

Said intervening creditors are creditors of the Carnegie Land Company, their respective debts being evidenced by notes which were executed for various and sundry articles, and are specifically set out in the master's report.

See Tr., p. 915, 916, 917, 918.

At the date of the execution of the notes to said petitioners respectively, the Carnegie Land Company, being the holder and owner of a mortgage-bond issue of the Carnegie Iron Company, secured by trust deed or mortgage, real estate, holdings, assets, &c., deliv-

ered and pledged to said petitioners, said Carnegie Iron Co., bonds as follows:

First National Bank of Chattanooga, seven bonds, Nos. 8, 9, 10, 11, 12, 39, & 40.

Edgefield & Nashville Manufacturing Co., eight bonds, Nos. 22 to 29, inclusive.

Jonesboro Banking & Trust Co., five bonds, Nos. 1, 2, 28, 65, and 66.

H. S. Chamberlain, sixteen bonds, Nos. 45 to 60, inclusive.

Each and all of said bonds were at the par value of $1,000.00. See decree, Tr., pp. 1188, 1189, 1190, 1194, 1195.

The Carnegie Iron Co. is an insolvent foreign corporation, and as such is being wound up in the U. S. circuit court, at Knoxville, Tenn., in which proceedings each and all of the aforementioned parties intervened by petition as creditors for the purpose of setting up and enforcing their securities as the pledgee holders
180 of said iron company bonds held as collateral to their respective debts.

At the hearing of said cause in said Federal court petitioners obtained a decree in their favor for the amount of their respective debts, as follows:

First National Bank of Chattanooga, $5,033.58.

The Edgefield & Nashville Mfg. Co., $6,921.00.

Jonesboro Banking and Trust Co., $1,739.33.

H. S. Chamberlain, $4,058.19.

J. C. Cullen, $577.33.

And said decree further recites that it appearing that said bonds were pledged to secure said indebtedness, the amount of *pro rata* accruing thereon should be applied to the satisfaction of the respective debts which they secured until same were satisfied; and said decree contained this further provision with reference to said claims and said bonds:

"It is by the court decreed that in view of the fact that said creditors hold the securities, the notes of the Carnegie Land Company and the bonds of the Carnegie Iron Co., and that the land Co. is largely indebted to the iron Co., the creditors specified in this section be, and they are hereby, required to look in the first instance to and exhaust their several remedies against the assets of the Carnegie Land Co., now in course of administration, to the chancery court at Johnson City before they can participate in the distribution of the assets of the Carnegie Iron Co. hereinbefore ordered to be made; but (those creditors intervening herein who are primarily the creditors of the Carnegie Iron Co. assenting thereto) it is further ordered and decreed that the creditors listed in this section as holders of Carnegie Land Co. notes may participate in the distribution of the assets herein without such
181 prior exhaustion of the assets of the Carnegie Land Company on condition precedent that they severally, within 20 days from January 27, 1896, file with the clerk of this court an assignment or transfer of all and singular the demand or demands of such

assignor creditor against the Carnegie Land Co., together with any and all priorities, liens, titles, or securities incident thereto (save collateral bonds of the Carnegie Iron — so allowed to participate in the distribution made in this cause) to A. R. Wing, assignee and receiver of the Carnegie Iron Co., for the benefit of those entitled to the benefit of the proceeds under the terms of this decree, such assignment and transfers to be on condition, however, that said Wing, assigner and receiver, shall be entitled to intervene and recover the whole amount of such assigned claims, but shall retain for the beneficiaries under this decree other than such assignors only so much of the proceeds of the asset or demand assigned as shall remain after the assignor is paid in full his — or his indebtedness adjudged above—that is to say, if any assignor fails of being fully paid such adjudged indebtedness in this court and cause he or it shall be entitled to receive from the Carnegie Land Co.'s assets, through said A. R. Wing, any balance, with accrual of interest, before the said Wing, assignee and receiver, is entitled to retain anything under said assignments for said other beneficiaries.

"It will be sufficient that such assignment set forth that they are made under the terms and upon the conditions of this decree. In event any such creditor fails within the 20 days limited to file such transfer, he shall be deemed to have elected to look primarily to the assets of the Carnegie Land Co., and payment will not be made to him or it until and as ordered in the further progress of this cause."

182 See decree, Tr., pp. 1194, 1195.

Each and all the parties hereinbefore named assigned in writing their claims, priorities, liens, titles, and securities under the terms and conditions of said decree to the said A. R. Wing, assignee and receiver, and the said Wing intervened herein and filed said several assignments.

See said assignments, Tr., pp. 756, 757–'8–'9, & 760.

On these claims the chancellor decreed as follows:

"On the several claims assigned to A. R. Wing, assignee, &c., it is adjudged that he is not entitled to recover herein for the benefit of the creditors of the Carnegie Iron Co.; but said assignments appearing to have been made under orders in a cause wherein the assignors were prosecuting claims on securities given by the land Co., said assignors are not prejudiced thereby and will be permitted to prove their claims herein and recover up to satisfaction."

Error Assigned.

I.

It was error to decree that said assignor creditors "will be permitted to prove their claims herein and recover up to satisfaction."

We respectfully insist that said assignor creditors having elected under the decree to assign their claims and securities to said Wing, assignee and receiver, they thereby became entitled to receive their

bond *pro rata* in said Federal court cause, and should have been required to have credited their respective claims with the amount realized in said cause before they were permitted to share in the distribution in this cause up to satisfaction.

For ought we know, said assignor creditors have shared in
183 the distribution in said Iron Co. cause, or if they have not in fact so participated, there is nothing in the way of their so doing, and it would be inequitable to take the funds of this case and apply the same to the satisfaction in full of these claims to the prejudice of other creditors, and it could not possibly prejudice said assignor creditors to require them to so credit their respective demands before participating herein.

REEVES AND BAXTER &
DEADRICK & EPPS,
Sol's for Complainants in Original Bill.

184 Filed Oct. 9th, 1896. J. G. Stuart, D. C.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

and

WILBERFORCE SULLY, Trustee, ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

} Washington, Equity.

And Consolidated Causes.

Assignment of Errors for Sully, Trustee, and Carhart.

I.

Statement of the case.

The original bill by the American National Bank *et al.*, which was by the court sustained as a general creditors' bill, was filed on the 27th day of November, 1893, against defendant Carnegie Land Company and others.

See Trans., vol. 1, p. 2.

The only allegations of said bill upon which the contention is made that it should be sustained as a general creditors' bill is the insolvency of the Carnegie Land Company, it having previously made a general assignment, and the further fact that the said deed of general assignment provided, as required by law, that the assets and funds should be prorated equally among the creditors.

See O. B., vol. 1, p. 10.

The court sustained the bill as a general creditors' bill over the

protest and exceptions of the assignee and defendant Carnegie
185 Land Company solely upon the ground that the defendant company was insolvent, and refused to remove the assignee and appoint a receiver.

See order, Tr., vol. 1, p. 79, 80.

It is true that the bill also alleged that the trustee was failing and refusing to execute the trust, but the chancellor held against that contention by refusing to remove trustee and appoint a receiver at that time or at any subsequent time, although complainants' counsel have expended all their labor in this cause to that end, and, in addition, the receiver and his counsel, without appeal, have been allowed and paid their compensation for services properly and efficiently rendered, as thus held by the court.

Petitions were filed after notice given for creditors.

On May 28th, 1895, complainant- Wilberforce Sully, trustee, and A. B. Carhart filed their original bill in the chancery court of Washington county for the purpose of foreclosing a first and only mortgage made to said Sully, as trustee, to secure an issue of $300,000.00 of bonds, said mortgage being upon all the property of every kind and description, and also the equity in the hotel property, formerly mortgaged to the Traveler- Insurance Company, $85,000.00 of said bonds being then outstanding and owned by co-complainant, A. B. Carhart, for whose use and benefit the said bill was filed.

See O. B., Tr., vol. 1, p. 237 *et seq.*

Upon this bill the court endorsed:

"Let this bill be filed as an original bill, but the complainants herein or the complainants in the pending bill, known as "the general creditors' bill," being styled The American National — *et al. vs.* The Carnegie Land Company *et al.*, may move for a consolidation of that cause with this or this cause with that, and the
186 pending injunction is modified hereby to that extent.

JOHN P. SMITH, *Chancellor.*

See order, Tr., vol. 1, p. 258.

At the next ensuing session of the court the causes, by consent, were consolidated. All proper parties to such foreclosure, including Travelers' Insurance Company and its trustee and the defendant company, were made to the said bill and answers were put in, and also American National Bank *et al.*, for themselves and general creditors, asked and were allowed to become parties and made defense to said bill.

Tr., vol. 2, p. 321–326.
Tr., vol. 1, p. 235.

The cause progressed, and sale was had of all the property under the consolidated causes, and Travelers' Insurance Company became the purchaser of the hotel, furniture, etc., therein at $25,000.00. Sully—not as trustee, nor for complainant Carhart, but for him

self—purchased all the notes, accounts, etc., of the company for $6,100.00, and the other realty for $25,000.00, and the sales were, by consent, confirmed to the purchasers.

Vol. 2, Tr., 316 *et seq.*
Vol. 2, Tr., 391–392.

In the later decree, which is by consent, it is provided that "for the Carnegie Hotel property, real and personal, we will not report a sale unless the bill therefor shall amount to $25,000.00, and said property may be sold as a whole, both *real and personal.* The intention of this decree is to sell only such interest and equities as the Carnegie Land Company has in or to said property, and *purchasers at the sale will take only such interest as said defendant has and subject to all equities existing against said defendant.*"

187 For decree of confirmation.
Tr., vol. 2, p. 394 *et seq.*

Proof was taken on all claims, and court in a voluminous decree fixed priorities and preferences and ordered final*ly* disposition of funds accordingly, and all said parties appealed therefrom.

For first decree, see Tr., vol. 5.

For final decree after master's report as to priorities according to former decree, see Tr., vol. —, p. 1 *et seq.*

Complainant- Carhart and Sully, trustee, took special appeal from the following parts of said decree:

1. Sustaining bill of American National Bank *et al.* as a general creditors' bill.

2. Allowing preference to ad val*orum* State, county, and municipal taxes accrued since the making and registration of complainant Carhart's mortgage, to wit, Feb. 10th, 1893, as superior thereto.

3. Refusing to place upon the Travelers' Insurance Company, the purchaser of the hotel property and furniture, the debt of the Edgefield and Nashville Mfg. Co., which under the decree it assumed in its purchase.

4. Ordering all costs, counsel fees, assignee's compensation, and counsel fees payable out of the mortgage funds instead of out of the funds going to general creditors, for whose alleged benefit the services were rendered, and as to the amount of the compensation allowed to counsel of general creditors in this cause.

5. Allowing interest on debts due Tennessee creditors and attorneys' fees, there accrued since complainant's mortgage, as prior thereto.

188 6. For allowing claims of American national bank as prior to that of complainant Carhart, all of which points were made by divers exceptions to the master's reports, specifically and in detail.

7. By writ of error, complainant excepts to that part of the decree which holds the acts of 1877 and 1891 constitutional, and thus giving Tennessee creditors' debts previously contracted priority.

8. Also to that part of the decree giving Tennessee creditors priority over the mortgage creditors, and holding, for that purpose,

that the act of 1877 as to distribution applies, instead of the general assignment act of 1881, and setting aside said general assignment. Exceptions were likewise made to the master's report raising above questions.

See Tr., vol. 5, 1402 *et seq.*
See Tr., vol. 6, pp. —.

And complainant Carhart here assigns errors upon each of the above points in this court.

1 and 8.

Chancellor erred in sustaining the bill of the American National Bank *et al.* as a general creditors' bill, and also in setting aside general assignment and not distributing — accordance therewith.

It will be observed that the reversal of the chancellor's decree in this respect will not have the effect to defeat the sales of the property herein sold, nor defeat the other adjudications of the court, except such as immediately follow the general creditors' bill, such as counsel fees, for the reason that the foreclosure bill of Sully, trustee, brings before the court all parties necessary to a sale, and in foreclosure suits all prior equities against the property
189 mortgaged may be determined, to the end that the property may be advantageously sold and the purchaser receive a good and unincumbered title, and the sale, etc., in this cause was had in pursuance of the bill of complainant trustee-, Sully and Carhart, and nor alone nor exclusively under the alleged general creditors' bill.

It will be noticed that the learned chancellor sustained this bill as a general creditors' bill solely upon the ground of the insolvency of the defendant corporation when that corporation's assets were at the time being administered by a trustee appointed by the county court under authority of the general assignment act. Of course, we do not insist that in this case the chancellor court could not take jurisdiction of this corporation's assets under the allegations of complainants' bill as to insolvency, non-user of franchises, etc., were it not for the fact that a court of concurrent jurisdiction had already taken charge of said assets, and no reasen is given for the exercise of the chancery jurisdiction except that the general assignment was fraudulent and void because it was made under the general assignment law and according to its provisions and not according to acts of 1877 and 1891.

It has been decided and is fixed by statute that when no other court has jurisdiction the chancery court can take jurisdiction on the ground of insolvency, non-user, etc.

Code (M. & V.), sec. 5037, 5038, 4168.
Tradesman Pub. Co. *vs.* Carwheel Co., 11 Pickle, 649.

But under deed of trust it is provided by statute that the assignee shall take the oath, give bond, make his inventories, and report his sales to the county court, and thus subject himself and his
190 estate to the jurisdiction of the county court.
Code M. & V., sec. 2731.

Now, of course, when a corporation makes a deed of trust under section 2731 of Code or under act of 1881, and comes under the jurisdiction of the county court, it has been guilty of overt insolvency, non-user of its franchises, etc., so that the jurisdiction of the county court and chancery is concurrent; and if the bill in this cause by the American National Bank *et al.* is sustainable as a general creditors' bill, the result is that the only course for an assignee of a corporation to adopt when an assignment is made is to immediately file a bill in the chancery court, and thus deprive the county court of all jurisdiction, because if such a bill be sustained by the chancery court it would be absurd for a trustee to then continue to file inventory and sales and reports to the county court; therefore we insist that a correct view of the law is that when an assignment or deed of trust is made that the chancery court cannot oust the county court of its jurisdiction, nor the corporation of its chosen forum, except by allegations of something more than insolvency. There must be a question of construction or an attack of the deed, or something of that character. Now, this is sought to be remedied by the claim that the deed was void because it does not provide for priority for Tennessee creditors over all other classes.

We insist that under the allegations of the bill and the law that when a corporation or whatever character accepts the benefits of the acts of 1881 as to general assignments, and the assignment is executed according to the statute, the Act of 1881, p. 154, explicitly provides that "all general assignments shall operate for the benefit of all the debtor's creditors *pro rata*."

Of course, we concede that this act of 1881 could not and
191 was not intended to effect fixed liens made by valid contract or statute upon the assets before the assignment was made, and that therefore the assets passed into the hands of the trustee burdened with such fixed liens.

But this does not apply to a mere floating equity created by statute, such as the preference attempted to be given to Tennessee creditors by the acts of 1877 and 1891, when such corporations are being wound up in insolvent bills or by creditors, and it had been held, as we are advised, that this court has declared such an equity in favor of such Tennessee creditors not a lien in any sense upon the assets of the corporation, and in fact it can be seen from the act itself that such an equity cannot rise to the dignity of a lien:

1. Because it would be too floating and uncertain, as the property subject to it would be constantly changing; and,

2. If fixed, the business of the corporation could not be carried on, as no purchaser would contract for encumbered property, nor see to the lifting of *fixed* liens held by numbers of unknown parties for unknown amounts; and,

3. The act does not declare any lien.

McClung *vs.* Embreville Freehold Co.

So that we insist that the floating equity of the statut- of 1877 and 1891 continued till the act of 1881, and its application takes effect for all creditors except those having fixed liens.

When a corporation makes a general assignment it is not the *will* or *volition* of the corporation itself that makes all creditors share *pro rata*, but it is the statute or law that so compels, and a law that must be respected equally with the act of 1877 or 1891.

192 Would it not be inoperative for a foreign corporation doing business in this State, in making a general assignment of their assets *unencumbered* by any *fixed lien*, and as much theirs to *assign* as to *sell*, to provide that Tennessee creditors should have preferred rights, in the very teeth of the act under which they were acting, which forfeits preferences?

The only reason fixed liens cannot be affected is that they existed and were fixed upon the very property itself before the act was invoked and its provisions complied with and its assets affected by it, and if the assignment was valid, then any attack made thereon by complainants would deprive them of sharing to any extent in the property embraced therein, and we need cite no authority upon this point.

Unless our construction is correct, a foreign corporation complying with the acts of 1877 and 1891 has no right to make a general assignment at all.

We therefore insist that the chancellor erred in sustaining the bill of the American National Bank *et al.* as a general creditors' bill, and also in setting aside said general assignment and ignoring *pro rata* distribution thereunder and giving preference only to fixed liens, not floating ones, and therefore erred in giving preference to Tennessee creditors over complainants' mortgage, and should have held that the general assignment law controlled these assets and not the act of 1877. Said act was, besides, not complied with by manufacturing or mining —, so as to put the provisions in operation for Tennessee creditors by working its mining property within one year. Sec. 7, act 1877, chap. 31.

The chancellor erred in allowing ad valorum State, county, and municipal taxes, which accrued subsequent to complainants' registered mortgage, priority over the mortgage. The mortgage was made and registered, as before stated, on the 10th of Feb.,

193 1893, and we therefore insist that the taxes of 1894 and subsequent years were liens only on the interest of the mortgage, and were not liens *in rem;* were subordinate to the lien of the mortgage, as has been decided by this court.

Cowan *vs.* Nashville, 10 Lea, 209.

Cardwell *vs.* Crumley, decided in an oral opinion, Knoxville, 1895.

This exception was made to the report of the clerk & master as to ad valorem taxes, and again to the amended report.

Tr., vol. 5, p. 14–24.

Tr., vol. 6, p. —.

The amount of said ad valorum State — county taxes upon property mortgaged to Carhart amount to the sum, for the year 1894, which is inferior to complainant Carhart's mortgage, outside of corporation $58.85

Tr., vol. 3, p. 780.

Inside of corporation, 1894	280.07
Id., id., p. 782.	
Corporation taxes, 1894	446.41
Id., id., p. 783, 784.	
Also for 1894, additional State and county	5.91
Also for 1894, additional corporation	17.04
Making a total of	$808.28

upon which — master counted interest also up to date of last report in August, 1896.

The only ground upon which the court relied for overruling or undermining the cases before cited rests upon sec. 806,
194 M. & V., which says that whenever real estate is sold under a decree of any court in the State it shall be the duty of the judge of said court before the *sale* is confirmed to the purchaser to have a reference made to the clerk to ascertain if *upon the day of the sale* there were any *taxes due and unpaid that were a lien upon said real estate*, and if it were found that there were taxes that were a lien upon the real estate upon the day of sale, etc., they should be paid, and there may be some other similar statute authorizing the purchaser to have a reference to ascertain taxes, but we submit to the court that it is too plain for argument; that the legislature did not intend to make taxes by this proceeding a lien *in rem*, but that it provided a method whereby the purchaser might be enabled to ascertain the taxes which *would be a lien upon the land in his hands*, and that said act nor any similar act would have the effect to enable a purchaser or the court, acting in his interest, to fix by such a proceeding a lien for taxes upon the land and the mortgager's interest in it which did not exist at the date of sale and would not continue to exist as an encumbrance.

In other words, the purchaser in this case could not create a lien which the Supreme Court have held the legislature had never put upon the land.

And that such taxes are not a lien upon the land in purchaser's hands, because the purchaser got the title of the mortgagee, which is superior to the lien for taxes, as has been expressly held.

III.

The chancellor erred in exonerating by final decree the Travelers' Insurance Company, the purchaser of the hotel and furniture, from the payment of the Edgefield & Nashville Mfg. Co. debt of
195 $7,000.00, which represented the purchase-money of the furniture in said hotel, and to which furniture the right and title was retained.

Tr., vol. 2, p. 339.
Tr., vol. 3, p. 701.
Tr., vol. 3, p. 732.

As has been before stated, by agreed decree entered before the sale this provision is incorporated therein: "The intention of this

decree is to sell only such interest and equities as the Carnegie Land Company has in and to said property, and purchasers at the sale will take only such interest as said *defendant has* and subject to all *equities* existing against said defendants."

Tr., vol. 2, p. 392.

Now, this Travelers' Insurance Company has a mortgage on this very property, and was a party to the record and agreed to this decree and bought the hotel and furniture, on which the Edgefield & Nashville Mfg. Co. had right and title to secure the $7,000.00.

Now, the plain language of the decree shows what interest the purchaser bought and what the purchaser assumed in the purchase, and it is too plain for argument that the court cannot by subsequent decree change this former decree and endeavor to release the Travelers' Insurance Company of this burden. The decree of confirmation vests the title in the Travelers' Insurance Company, according to the terms of the sale, as before stated.

Tr., vol. 2, p. 401, 402.

Now, the said purchaser got said property, including furniture, fixtures, and all furnishings of every character, for the sum of $25,000.00. Of course, it cannot be for a moment doubted but that in making said low bid it took into consideration, as did all other bidders, the fact that it must assume such encumbrances on the property in the hands of the Carnegie Land Company as then existed; otherwise the said provision in the decree of sale would
196 be entirely nugatory, and it was a consent decree, binding upon the parties and cannot even be appealed from, and it is not affected by the Travelers' Insurance Company's broad appeal in this case.

It is true that the court allowed the burden of the Edgefield & Nashville Mfg. Co.'s claim upon the said purchaser to the amount of the alleged value of said furniture, to wit, about $1,376.00, but this is in the very face of the decree of sale and confirmation and in face of the fact the property went low at $25,000.00 on account of that very encumbrance, and now to allow the purchaser to have the property, the valuable part, at $25,000.00 and without handicap and throw off the burden of $7,000.00 by paying 1,376.00 would be manifestly unjust and unlawful and contrary to a consent decree, and said burden should be borne manifestly in addition to, not out of, said purchase-money.

IV.

The chancellor erred in onerating the mortgage funds with the costs, counsel fees, assignee's fees, and his counsel fees, amounting to about $17,000.00, out of $60,000.00 of funds.

The first reason why this is error is that the bill, as before stated, should not have been sustained as a general creditors' bill, and therefore no general creditor's fee is in any event allowable against any fund; but for other reasons it is manifest error, in our opinion, to charge the mortgage funds with all costs, fees, etc., and thus enable the Tennessee creditors, for whose benefit this suit was brought,

to collect their debts with interest, protest fees, and attorneys' fees, without any costs or attorneys' fees whatever to pay. No services were rendered by the solicitors for general creditors for the mortgagee, and but the smallest amount of costs were incurred
197 in their behalf, and instead of services in aid of and for the benefit of the mortgagee it was always antagonistic, and although — mortgage itself is attacked unsuccessfully, yet by this decree the mortgagees, in addition to their own counsel and expenses, must pay the costs and counsel fees of their antagonists. Tr., vol. 6, p. 1732, Q. 6 and ans.

We insist that such a decree is not justified by precedent or reason.

The theory on which counsel fees for general creditors have been allowed, payable out of a common fund, is that one jointly interested with others in a common fund, who, in good faith, maintains a litigation to save it from waste and secure its proper application, *it* entitled in *equity* to the reembursement of his costs, as between solicitor and client, as distinguished from party and party, either out of the fund itself or *by proportionate contributions from those who receive the benefit of the litigation.*

5 Thompson on Corp., sec. 7056, p. 5586.

The above is taken from an opinion delivered by Justice Bradley, of the U. S. Supreme Court, 105 U. S., 527, in a case where a bondholder for and in behalf of the other bondholders, like interested, brought suit against trustees of a corporation who were wasting its assets.

"The contrary principle, founded in the just conception that an attorney-at-law is no better than anybody else, is that which denies to him the right to make another person his debtor without his consent, and which holds that the mere fact that the attorney, by his exertions, incidentally benefits some one or the estate of some one, does not entitle him to recover his fees of that one or to charge them as a lien upon the estate so benefited."

5 Thompson on Corp., p. 5586, citing cases, and Thompson approves of this latter doctrine. *Id., id., id.*

198 Now, the trustee Sully, and acting for the bondholder Carhart, under his mortgage upon all the property sold in this case except that mortgaged to the Travelers' Insurance Company, could have advertised and sold the property at slight cost, or could go into chancery and foreclose the mortgage as they have done by their original bill filed and consolidated herewith.

Could complainant, by a general creditors' bill, affect the lien or foreclosure of complainant Carhart's mortgage, or aid him in any way?

The only thing complainants could do would be to set up an alleged prior lien to the mortgage by virtue of the acts of 1877 and 1891, as to foreign corporations, and ask that, through their suit, the Tennessee creditors prior to the mortgage might be paid out of a fund to be carved out for them.

What fund is it which is *common* to the claims of the Tennessee creditors prior to the mortgage?

No one will be paid a dollar after satisfying the mortgages, so that there are, in real-ty, two funds out of which the costs and counsel fees can be paid: the fund going to Tennessee creditors, whose debts contracted prior to the mortgages, and the mortgage fund.

Now, what fund did the suit of the American National Bank bring into court, if any at all? That suit, as it stands, can only be taken as a bill to administer the funds of the Carnegie Land Company so as to pay out of the said funds the Tennessee creditors, whose debts antidated the mortgage, if unsuccessful in setting aside the mortgage, as they have been, and only in the former respect has said suit been successful. Is a mortgage creditor a general creditor?

And can a mortgage creditor be deprived of his security, or
199 a part of it, by costs and fees forced on him against his will and his interest?

The limit to which any court has gone in the allowance of such costs and fees only permits the complainant towards costs and fees to have "*proportionate contributions from those who receive the benefits of the litigation.*"

Suppose we say nothing of the opposing doctrine, and yet can the most lax construction of the doctrine invoked by the court below permit any contribution towards the costs and fees, except from those Tennessee creditors represented or assumed to be represented by complainants, and who are entitled "to have a common fund" with them carved out of the mortgaged assets.

What was the fruit of the labor of complainants and their counsel? The fund for prior Tennessee creditors, and all Tennessee creditors permitted to share in that common fund, should contribute and make up the fees and costs incident to that controversy.

Instead of doing that the chancellor held all costs and fees of all sorts paid first out of the gross funds, all of which was the mortgage funds, and then Tennessee creditors to contribute nothing towards expenses, costs, or fees, but get their debts in full, with interest and attorneys' fees allowed to them, in addition to general creditors' fees, etc.

These Tennessee creditors have only a statutory equity, not a fixed lien, and the doctrine of contribution to the costs and counsel fees in general creditors' proceeding is only an equity, and we insist that they must pay their costs and counsel fees and their proper proportion at least of the assignee's compensation and his counsel fees, as a matter of common honesty.

The mortgage creditors should pay only their own counsel fees, the commission for the sale of the property, and their costs. There
has been no case decided, to our knowledge, in this State,
200 which raises the direct question as to whether counsel fees of parties representing a class superior to the lien of the mortgage must look to the fund acquired by them for their class or can trench on the mortgage fund for their compensation and costs, but the equity of the case seems apparent, and we are sure that no

authority in this State or elsewhere can be found to sanction the doctrine applied in this case.

The cases decided in this State seem to be where the court had under consideration the question as to whether the paramount claimant of the fund brought into court can be required to contribute to the attorneys' fees and costs of the inferior claimant bringing the fund into court, and the court has uniformely decided in the negative.

5 Pickle, 460, and cases cited.

The principle being that the superior lien cannot be disturbed nor impaired by the action or conduct of inferior claimants.

We insist, on the same principle, that the lien and value of the mortgage cannot be disturbed or impaired by a superior claim, not a lien, for which a fund is carved for its payment except to the extent of said claim.

It has been held that when the interests of the parties to a suit are adverse that nothing except the legal taxable costs can be allowed to one party as against the other.

Beach on Receivers, sec. 752.

91 N. Y., 57, 59.

It would not be contended for a moment that if the complainant had been a first mortgagee and had filed a bill to foreclose it and a second mortgage and realized more than enough to satisfy the first mortgage that out of the fund due the second mortgagee counsel fees of first mortgagee could be taken; then surely a
201 general creditors' bill can create no greater lien than a mortgage.

Again we insist that the fee allowed counsel for general creditors is exorbitant and illustrates the excess and perhaps illegal allowance of which the court expresses its disapproval in the case in 105 U. S., 527, before cited.

The depositions of two or three attorneys are taken, which were entitled to weight, and these witnesses state that upon a basis of $30,000.00 brought in by counsel for Tennessee creditors $3,000.00 would be a reasonable fee.

Dept. of W. W. Faw, Tr., 1810.

Dept. of Johnson.

Now, the fee was fixed at $5,000.00, less fee paid by complainants individually to their counsel.

We take the law to be that when the record of the services of the counsel is before the court and the court is familiar from the record with the services that it is the duty of the court to use its jusgment upon that question, as upon any other point of judicial decision, and not be goberned absolutely by the testimony of attorneys or experts. Their testimony is not conclusive.

Weeks on Attorney-at-law, p. 568, and in an unreported case decided by the supreme court, through Judge W. F. Cooper, at Knoxville, about the year 1886, it was held that it was the duty of the

court in a case of that character when the record of the services was before the court to look to it as to the services and value.

Branner *vs.* Caldwell & Washington.

Now, what were the services? The original bill was filed, some ten or twelve orders and decrees were drawn, and about the same number of depositions taken. All petitioners were represented by their own counsel and took their own proof, and nearly all
202 the efforts of the complainants' solicitors *was* directed to the attempted removal of the assignee, which failed of accomplishment.

And the fund was brought into court by the bill of Sully, trustee, and Carhart as much as by the bill of complainant America- National Bank *et al.*, and in fact the property was never taken out of the hands of the assignee and into the hands of the clerk and master for sale except after the foreclosure bill was filed.

We submit that when these funds ($60,000.00) have been tolled—$3,500.00 by the assignee, $2,000.00 by the assignee's counsel, $750.00 by counsel assigned to appear in one case, same as counsel for general creditors, which was lost in Federal court, $7,000.00 by solicitors of complainants and the clerk and master—that $3,000.00 should be ample compensation for services as counsel for general creditors, together with such fees as their individual clients may pay.

It is subject of reflection that of an estate of $60,000 $17,000 should be consumed in costs and fees and yet not including the fees each client will pay his own solicitors.

V.

Chancellor erred in allowing interest, attorneys' and protest fees, which accrued upon the Tennessee debts subsequent to the mortgage of Carhart as a prior claim to said mortgage.

It is unnecessary here to state the amount of said interest and attorneys' and protest fees, as it is shown, item by item, in the exceptions of complainant Carhart to the reports of the master, and reference is here made to the items.

Tr., vol. 5, p. 1402 *et seq.*

Tr., vol. 6, p. — *et seq.*

The section of the act of 1877, chapter 31, under which this priority is claimed, is as follows:

203 "Nevertheless, the creditors, who may be residents of this State, shall have a priority in the distribution of assets, of subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country, or countries, and also, over mortgage or judgment creditors, for all debts, engagements and contracts, which were *made or owing by the said corporations previous* to the filing and registration of such valid mortgages, or the rendition of such valid judgments, but all such mortgages and judgments shall be valid, and shall constitute a *prior lien* on the property, on which they are, or may be, charged

as *against all debts, which may be incurred subsequent to the date of their registration or rendition.*"

Code M. & V., sec. 1997.

There is, to our knowledge, no such statute as embraced in the above ever been enacted in this country at least, and we have had no construction on this section in this State.

We will assume, for the purpose of this argument, that the section is not in violation of the Constitution of the U. S. nor of this State, but strive to reach the intent of the legislation:

1. As to the interest.

The only ground upon which this is allowed is that interest is an incident of the debts.

Now, we will admit that interest is usually an incident of the debts, but the crucial test to determine priority is, when was the interest incurred and when did it accrue?

If before the registration of the mortgage, then it has priority by reason of the statute only, which gives the principal even priority; but if afterwards, then the statute expressly declares that the mortgage shall "constitute a prior lien against all *debts which may be incurred* subsequent," etc.

204 If against all debts, is it not reasonable to say that it would make subordinate *all parts of debts* incurred subsequently?

This priority is a great privilege extended to Tennessee creditors beyond their contract and derogatory to the common law and the contracted rights of others, and we insist that for those reasons should be strictly construed as to all who share and to the extent they should share, but when the class is ascertained and fixed and the amount protected ascertained, then only should the court be liberal in the advancement of the remedy as analogous to other cases.

2 Hum., 295–445.
2 Yerg., 599.
3 Sneed, 397.

Now, it is only by invoking the extremely technical doctrine of relation that the interest accruing after the mortgage can be given priority; in other words, they say as the principal was incurred before, it draws to it whatever interest follows after. Now, the debt, they argue, is composed of two parts, principal and interest; the interest, however, only the incident of the principal.

But we insist that if both are parts of the same debts that the act does not profess to give priority to any debt except incurred before the mortgage.

And no one can for a moment contend, except by relation, that the interest accruing after the mortgage was "incurred" before. The equity of our construction is manifest when we consider the relation of the parties.

The mortgagee lands his money or sells his property on the face of the property.

He has no way of learning what equities there are in favor of

Tennessee creditors, the amounts of their debts, etc. They
205 have no mortgage registered, which is notice to those who deal with the property in case of liens, or anything else than mere floating equities, such as this is, in favor of Tennessee creditors.

The mortgagee has no way of forcing the Tennessee creditors to collect their debts of the principal and stop interest, and his mortgage is notice to all creditors, yet the mortgagee must suffer by the default of the principal and the non-action of the Tennessee creditors in the piling up of interest and fees.

Now, there is no analogy between the case of the Tennessee creditors in this case and the mortgagee, and that of first and second mortgagee.

In the latter case the lien is fixed upon every part of the property and notice given of the same, ans the security is given, on its face, for the purpose of securing the debt and interest; and, now, if the instrument did not recite that the interest was secured the second mortgagee would take notice of the contract, bearing interest, ans the relations of the parties, the first and second mortgagee and the debtor, and the debts are all fixed by notice and contract, but it is entirely different in the case of the Tennessee creditors and the mortgager.

The Tennessee creditors *has* no lien, which is fixed upon the property mortgaged; no notice is given to the mortgagee of the amount named or anything else except as the debtor may feel disposed to disclose, and debtors, when arranging for a loan, are prone to conceal rather than disclose their indebtedness. The mortgagee cannot, therefore, discharge the prior indebtedness nor have it collected; therefore the justice of the act, if there is any justice in it, which allows Tennessee creditors to collect only the debt incurred
before the registration of the mortgage and not that incurred
206 afterwards, and we insist that the interest is a debt, or, at least, a part of a debt, and the act, properly and justly construed, will not allow the Tennessee creditors to visit the fruits of his delay upon the mortgagee, and that there is nothing in the act, and the court at least cannot go beyond it, which would justify such a construction.

This principle, upon which the debts of general creditors who are not entitled to lien, but priority simply by statute, is enforced without any statute universally by the Federal court, which hold that interest will not be allowed upon general debts given priority by statute as against the mortgage debt after filing of original bill and appointment of receiver.

Thomas *vs.* Bar Co., 109 U. S., 95.

If that be the true principle without statute, nothing to the contrary has been decided in this State to our knowledge, then all this interest should be disallowed, at least from the filing of the bill; but, under a *statute of* the kind under discussion in this case, when the priority is expressly limited to the debt contracted before the registration of the mortgage, certainly the court cannot say that at

the time the mortgage was registered the debts of the Tennessee creditors, principal and interest, to date, as they stand in priority in this record today, *had been incurred.*

As to attorneys' fees allowed to said Tennessee creditors on their debts—

It will — observed that a number of the notes executed by the Carnegie Land Company provided that in case the said notes were placed in the hands of an attorney-at-law for collection or had to be sued on, 10 *% per cent.* attorneys' fee would be allowed.

The items and particulars of these attorneys' fees are shown in detail in the exceptions of complainant Carhart before cited.

207 Now, these notes were never placed in the hands of an attorney-at-law, nor had to be sued on, as is admitted by the parties and counsel and shown by the record, until after the bill of the American national bank *et al.* was filed in this cause, some ten months after the registration of complainant Carhart's mortgage.

Now, because the contract was made with the original note and renewed from time to time, wherein the land company agreed to pay 10% attorneys' fees on certain contingencies in the future, therefore it is argued the att'y-' fees, though not contracted nor created at time of registration of mortgage, yet were incurred, in the sense of the statute, before the mortgage.

We insist that this is absurd, and only indicates where an erroneous construction of the said act will lead, unless the court holds to the idea that the *debt and all parts of it must be incurred* and a binding obligation upon the debtor corporation at the time or before the registration of the mortgage to be prior to it.

Now, when was the attorney-fee debt "incurred," within the language and meaning of the act—at the time of the making of the note or at the time it was placed in the hands of an attorney-at-law or had to be sued on?

We insist that at the time of the registration of complainants' mortgage no attorneys' fee was owed by the land company, nor was any "incurred," nor might ever be incurred.

That if the creditor expected to take advantage of the attorney-fee clause, he must put it in the hands of such attorney before the rights of the mortgagee attached to what was left of the property.

And yet, on the same system of reasoning and following the same principle, the court allowed protest fee incurred after this

208 suit was brought, as prior to the mortgage, that they were incident to the debt and compact, and therefore were "incurred" by this fiction before the mortgage, and we presume that the general creditors' fees, costs of this suit, etc., being necessary to the collection of these debts and incident thereto, as the protest and attorney fees, were also allowed priority on the same ground. In other words, that though this allowed attorney fees twice, both were incident and resulting from the contract, and were therefore "incurred" before the mortgage by fiction, though, in fact, twelve months later.

VI.

But though the court may hold the act of 1877, chapter 31 and sec. 5 thereof, constitutional, and that the said act had the effect to prohibit foreign corporations doing business in this State, and having complied with the act from making a general assignment, still the chancellor erred in giving the claim of the American national bank or any part thereof priority over the mortgage of complainant, and principally on the ground set out in complainant Carhart's first exception to the allowance of said claim by the master, which is as follows:

"The notes" (meaning the notes endorsed to the American national bank) "shown on their *face* from their date that they came into the hands of their *endorsee subsequent to the registration of Carhart mortgage*, Feb. 10th, 1893, and said American national bank, being organized under the *national banking acts or otherwise*, does not show any status for said claims or claimants superior to the claim of complainant Carhart under the mortgage registered on the 10th day of February, 1893."

See proof cited by the master and the notes filed as Exhibits B, C, D, E, and F to original bill, filed by American national bank; also dept. of J. W. Cure, filed Feb. 21st,
209 1896, Exhibit A thereto, and interrogatories 1 and 2 and answer- thereto.

Tr., vol. 5, p. 1402.

This exception is renewed to the last report of the master.

Tr., vol. 6, p. —.

Now, the notes sued on by the American national bank and exhibited to the bill are as follows:

Carnegie Land Company.

$600.00. JOHNSON CITY, *March 8th*, 1893.

July 5th, 1893, after date, for value received, we promise to pay to the order of Morton, Scott & Robertson six hundred dollars at ——.

CARNEGIE LAND COMPANY,
By J. W. CURE, *Ass't Treas.*
J. T. WILDER, *Security.*

Approved:
J. T. WILDER, *President.*

The other notes are all similar to the above, except two are for $580.00, and dated March 15th, 1893, instead of for $600.00, and dated Mar. 8th, 1893.

Tr., vol. 1, pp. 18 to 30.

The aggregate of these notes is about $5,000.00.

See master's report, Tr., vol. 3, p. 895.

Now, it will be observed that not one of these notes, payable on their face to Morton, Scott & Robertson, bear date before complain-

ant's mortgage, the said notes being dated March 8th and March 15th, 1893, before, in other words, on March 8th and March 15th, 1893, and previous thereto since 1891 Morton, Scott & Robertson were owners of those notes and that indebtedness, and must have, therefore, *endorsed* the said notes of American national bank, and of course endorsed them after *their date.*

Now, Morton, Scott & Robertson, being the holders and owners
210 of said indebtedness at the time it was originally contracted in 1891, and also on Feb. 10th, 1893, when complainant's mortgage was registered, and up to a date subsequent to March 8th and 15th, 1893, the date of said notes, therefore, unless Morton, Scott & Robertson were shown to be residents of Tennessee, the indebtedness held by the American national bank would not have priority over the complainant's mortgage debt, unless the court should further hold that a non-resident holding a debt against a foreign corporation domesticated in this State under the acts of 1877 and 1891, at the date of registration of a mortgage upon its property in this State, has, in order to avoid the priority of the mortgage as against the non-resident, a right to convey its debt to a domestic creditor after the mortgage is registered, and thus accomplish what the law forbids.

We take it that it will not be disputed that before a claim can have the status of a Tennessee creditor, whose debt was contracted before the registration of the mortgage, it must show itself entitled to that status, must show its priority.

Now, there is not an effort in this record from beginning to end that attempts in the slightest to show the residence of Morton, Scott & Robertson, and unless it be shown that the endorser and owner of these notes at the time of the creation of the debts or as well as the time of the registration of the mortgage was a Tennessee creditor, then a subsequent endorsee could not claim any higher right that his endorser had when the rights became fixed. The original bill does not even allege that Morton, Scott & Robertson were Tennessee creditors, but simply that the American national bank was a Tennessee creditor.

All the proof on the subject of the claim of the American national bank will by the court be found at the following pages
211 of the record:

Original bill, vol. 1, pp. 2–14.

Exhibits to bill, vol. 1, pp. 14 to 31.

Dept. of J. W. Cure, p. 731.

Ex. "A" to dep. of Cure, pp. 737–'8–'9.

It will be conclusively presumed, in the absence of such proof, especially when the endorsee was the moving creditor, that the endorser-, Morton, Scott & Robertson, were non-residents, and for that reason it would have aided nothing at least to complainant bank's status to have developed the fact that said endorser was a non-resident up to the time of the endorsement; but it is evident that complainant's contention was and is that as the American national bank, although a national bank, is a Tennessee creditor and presents and sues upon a claim which antedates the mortgage, although

contracted and held by a non-resident, that it has priority over the lien of the mortgage. This is manifestly erroneous, in our opinion. The act of 1877, ch. 31, is only intended to protect the debt of a citizen and resident of Tennessee with whom the corporation contracted and created the debt before the registration of the mortgage.

We apprehend that a time must be fixed when the status of the owner and debt as a Tennessee creditor and Tennessee debt must be fixed as a protection to a mortgagee. The act should not be construed so as to permit all non-resident creditors as soon as mortgages are made or they see approaching dissolution to transfer to Tennessee creditors or become one. That would operate alike to defraud the mortgagee and also *bona fide* Tennessee creditors. Neither should it be construed so as to permit the corporation approaching its winding up without mortgage to defraud Tennessee creditors by notifying its non-resident creditors to assign to
212 residents or become residents themselves.

The time should be fixed and immovable for the protection of all creditors, whether secured or unsecured, foreign or domestic, and the only time that can be fixed that will reliably determine the status is the residence of the creditor at the time of the contraction of the debt or the making of the engagement.

If you fix it at the time of the insolvency found you enable the corporation to disturb the just status of creditors before that event in the way before stated, and also you enable a non-resident who already has no priority, and therefore should have contracted with that view when a mortgage is made, to defraud the mortfagee and other Tennessee creditors. The- must be a definite class, and as to a particular mortgage the class having priority over it should be composed of those debts contracted to Tennessee creditors, for a Tennessee creditor contracting with the corporation as such should not be deprive- of the right to dispose of his debt in the State or without the status thus being always fixed, and even a non-resident holder of such debt being protected, and in no reasonable construction of said act would the court tolerate that a non-resident, both at the time of contraction of debt and at the time of registration of mortgage thereafter, should, after said mortgage is registered, and thus, by the act, the mortgagee acquiring the priority, confer and vest in another, a Tennessee creditor, the priority which neither the Tennessee creditor nor the non-resident would have had—in other words, the non-resident had no priority, and the *subsequent* Tennessee creditor had none, but by combining both, taking the debt of the non-resident and attaching it to the Tennessee creditor, it is sought to bridge the difficulty and obtain priority over the mortgage. We submit that this scheme will not work and
213 that the court will not tolerate any such construction of the said section of the act of 1877, chapter 31.

VII.

Chancellor erred in holding that the act of 1877, and especially section 5 thereof, was not in violation of the constitution of the

United States, amendment XIV, section I, and also of constitution of Tennessee, article II, sec. 17, and that therefore all creditors, whether domestic or foreign, and whether their debts were contracted before or since the registration of complainant Carhart's mortgage, unless they were specific liens upon the property mortgaged, superior to the rights of complainant, should only take in the distribution of proceeds of said mortgaged property after complainant's mortgage has been fully satisfied.

But, as this question has been decided adversely to our contention in case of MsClung *vs.* Embreeville Freehold & Iron Co., at Knoxville, 1895, and the case has now gone to the Supreme Court of the United States on the question, we will not press this assignment in argument.

SHIELDS & MOUNTCASTLE,
Solicitors for Trustee & Carhart.

By permission had of the court, we further insist that the chancellor erred in not declaring the act of 1877, chapter 31, to be unconstitutional, on the ground that it embraces more than one subject, and that not expressed in the title, in violation of the act 2, sec. 17, of the constitution of Tennessee, and we submit that this point is well taken and has not been passed upon by this court, and refer to the argument submitted by the counsel for the Travelers' Ins. Co.

SHIELDS & MOUNTCASTLE,
Solicitors for Carhart & Sully, Trustee.

214 In the Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

and

WILBERFORCE SULLY, Trustee, ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

Consolidated causes.

S. C. Williams, Esq., Johnson City, Tenn.

DEAR SIR: It appears from the record in the case of American National Bank *et al. v.* Carnegie and Company *et al.* and Wilberforce Sully, trustee, *et al. v.* Carnegie Land Company *et al.*, consolidated causes, lately pending in the supreme court of Tennessee, that you are solicitor for the following party, residents and citizens of another State than Tennessee, to wit: Page, Dennis & Company, who are of the same class with our clients, Wilberforce Sully, trustee; A. B. Carhart, Wilberforce Sully in his own right, Mrs. Mary P. Myton, and Travelers' Insurance Company, for whom we propose to prosecute a writ of error to the Supreme Court of the United States upon

error as assigned in the enclosed assignments of er-ors, the originals of which has been filed in the office of the clerk of the supreme court of Tennessee, at Knoxville.

Kindly acknowledge service of the notice, and endorse hereon your declination to join for your client in the application for the writ.

215 Respectfully,

SHIELDS & MOUNTCASTLE,
Sol'rs for Carhart, Sully, & Myton.
WEBB & McCLUNG,
H. H. CARR,
Solicitors for Travelers' Insurance Company.

Morristown, Tenn., Jan'y 20th, 1899.

Endorsed: American National Bank *et al. v.* Carnegie Land Company *et al.* and Wilberforce Sully, trustee, *et al. v.* Carnegie Land Company *et al.* Consolidated causes. Notice. Copy of within notice received. I decline for Page, Dennis & Co., the parties names therein, to join in the application for the writ of error, as contemplated, without waiver of right to sue out writ of error at a later date. Jan. 20, 1899. S. C. Williams, sol.

In the Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

and

WILBERFORCE SULLY, Trustee, ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

Consolidated causes.

Messrs. Faw & Cox, Johnson City, Tenn.

GENTLEMEN: It appears from the record in the case- of American National Bank *et al. v.* Carnegie -and Company *et al.* and Wilberforce Sully, trustee, *et al. v.* Carnegie Land Company *et al.*,
216 consolidated causes, lately pending in the supreme court of Tennessee, that you are solicitors for the following party, resident and citizen of another State than Tennessee, to wit, R. A. Wickersham, who is of the class with our clients, Wilberforce Sully, trustee; A. B. Carhart, Wilberforce Sully in his own right, Mrs. Mary P. Myton, and Travelers' Insurance Company, for whom we propose to prosecute a writ of error to the Supreme Court of the United States upon errors as assigned in the enclosed assignments of errors, the originals of which has been filed in the office of the clerk of the supreme court of Tennessee, at Knoxville.

Kindly acknowledge service of the notice and endorse hereon

your declination to join for your client in the application for the writ.

Respectfully,

SHIELDS & MOUNTCASTLE,
For Carhart, Sully, & Myton.
WEBB & McCLUNG AND H. H. CARR,
Sol's for Travelers' Insurance Company.

Morristown, Tenn., 20 Jan'y, 1899.

Endorsed: American National Bank *et al. v.* Carnegie Land Company *et al.*, and Wilberforce Sully, trustee, *et al., v.* Carnegie Land Company *et al.* Consolidated causes. Notice. Copy of within notice rec'd. We decline for R. A. Wickersham, the party named therein, to join in the application for the writ of error, as contemplated, without waiving right to sue out writ of error at later date. Jan. 20th, 1899. W. W. Faw, sol.

217 In the Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

Messrs. Reeves & Baxter and Deaderick & Epps, Jonesboro, Tenn.

GENTLEMEN: It appears from the record in the case of American National Bank *et al. v.* Carnegie Land Company *et al.*, lately pending in the supreme court of Tennessee, that you are solicitor- for the following creditor- resident of other States than Tennessee: Scioto Star Brick Works, who is of the class with our clients; Wilberforce Sully, trustee; Alfred B. Carhart; Wilberforce Sully, in his own right; Mrs. Mary P. Myton, and Travellers' Insurance Company, for whom we propose to prosecute a writ of error to the Supreme Court of the United States upon errors as assigned in the enclosed assignment of errors, the original of which has been filed in the office of the clerk of the supreme court of Tennessee, at Knoxville. You are hereby notified that on Wednesday, January 25, 1899, before the Honorable D. L. Snodgrass, chief justice of the supreme court of Tennessee, we will ask, at his chambers, in the city of Nashville, Tennessee, for a writ of error in the above cause, and in the event of your not joining in the application for said writ or noting hereon your declination to join for your client in the application for the writ, we will ask for an order of severance permitting us
218 alone to take out said writ of error and to receive benefits of supersedeas.

This the 21st day of January, 1899.

SHIELDS & MOUNTCASTLE,
Sol's for A. B. Carhart, Wilberforce Sully, & Mrs. Mary Myton.
H. H. CARR,
Sol. for Travelers' Insurance Co.

Filed Jan'y 26, 1899.
ALEX. McMILLAN, *Clerk.*
By J. F. STUART,
Deputy Clerk.

Endorsed: American National Bank *et al. v.* Carnegie Land Co. *et al.* Notice. Came to hand same day issued, and executed by leaving a true copy of the within notice with Reeves & Baxter and Deaderick & Epps. This Jan'y 23, 1899. J. S. Pritchett, sheriff.

In the Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

Messrs. S. C. Williams, Johnson City, Tenn.

GENTLEMEN: It appears from the record in the case of American National Bank *et al. v.* Carnegie Land Company *et al.*, lately pending in the supreme court of Tennessee, that you are solicitor for the following creditor- resident of other States than Tennessee: S. C. Williams, assignee of Page, Dennis & Co., who is of the class
219 with our clients; Wilberforce Sully, trustee; Alfred B. Carhart; Wilberforce Sully, in his own right; Mrs. Mary P. Myton, and Travelers' Insurance Company, for whom we propose to prosecute a writ of error to the Supreme Court of the United States upon errors as assigned in the enclosed assignment of errors, the original of which has been filed in the office of the clerk of the supreme court of Tennessee, at Knoxville. You are hereby notified that on Wednesday, January 25, 1899, before the Honorable D. L. Snodgrass, chief justice of the supreme court of Tennessee, we will ask, at his chambers, in the city of Nashville, Tennessee, for a writ of error in the above cause, and in the event of your not joining in the application for said writ or noting hereon your declination to join for your client in the application for the writ, we will ask for an order of severance permitting us alone to take out said writ of error and to receive benefits of supersedeas.

This the 21st day of January, 1899.

SHIELDS & MOUNTCASTLE,
Sol's for Wilberforce Sully, A. B. Carhart, and Mrs. Mary Myton.

H. H. CARR,
Sol. for Travelers' Insurance Co.

Filed Jan'y 26, 1899.
ALEX. McMILLAN, *Clerk*,
By J. G. STUART, *Deputy Clerk*.

Endorsed: American National Bank *et al. v.* Carnegie Land Co. *et al.* Notice. Came to hand same day issued, and executed by leaving a true copy of the within notice with S. C. Williams this Jan'y 21, 1899. G. F. Campbell, D. S.

220 In the Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

Messrs. Kirkpatrick, Williams & Bowman, Johnson City, Tenn.

GENTLEMEN: It appears from the record in the case of American National Bank *et al. v.* Carnegie Land Company *et al.*, lately pending in the supreme court of Tennessee, that you are solicitor- for the following creditor- resident of other States than Tennessee: A. R. Wing, assignee of Carnegie Iron Co., who is of the class with our clients; Wilberforce Sully, trustee; Alfred B. Carhart; Wilberforce Sully, in his own right; Mrs. Mary P. Myton, and Travellers' Insurance Company, for whom we propose to prosecute a writ of error to the Supreme Court of the United States upon errors as assigned in the enclosed assignment of errors, the original of which has been filed in the office of the clerk of the supreme court of Tennessee, at Knoxville. You are hereby notified that on Wednesday, January 25, 1899, before the Honorable D. L. Snodgrass, chief justice of the supreme court of Tennessee, we will ask, at his chambers, in the city of Nashville, Tennessee, for a writ of error in the above cause, and in the event of your not joining in the application for said writ or noting hereon your declination to join for your client in the application for the writ, we will ask for an order of severance permitting us alone to take out said writ of error and to receive benefits of supersedeas.

221 This the 21st day of January, 1899.

SHIELDS & MOUNTCASTLE,
Sol's for Wilberforce Sully, A. B. Carhart, and Mrs. Mary Myton.

H. H. CARR,
Sol. for Travelers' Insurance Co.

Filed Jan'y 26, 1899.
ALEX. McMILLAN, *Clerk,*
By J. G. STUART,
Deputy Clerk.

Endorsed: American National Bank *et al. v.* Carnegie Land Co. *et al.* Notice. Come to hand same day issued, and executed by leaving a true copy of the within notice with Kirkpatrick, Williams & Bowman this Jan'y 21, 1899. G. F. Campbell, D. S.

In the Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

Messrs. Faw & Cox, Johnson City, Tenn.

GENTLEMEN: It appears from the record in the case of American National Bank *et al. v.* Carnegie Land Company *et al.*, lately pend-

ing in the supreme court of Tennessee, that you are solicitor- for the following creditor- resident- of other States than Tennessee: R. A. Wickersham, who is of the class with our clients; Wilberforce Sully, trustee; Alfred B. Carhart; Wilberforce Sully, in his own right; Mrs. Mary P. Myton, and Travellers' Insurance Company, for whom we propose to prosecute a writ of error to the Supreme Court of
222 the United States upon errors as assigned in the enclosed assignment of errors, the original of which has been filed in the office of the clerk of the supreme court of Tennessee, at Knoxville. You are hereby notified that on Wednesday, January 25, 1899, before the Honorable D. L. Snodgrass, chief justice of the supreme court of Tennessee, we will ask, at his chambers, in the city of Nashville, Tennessee, for a writ of error in the above cause, and in the event of your not joining in the application for said writ or noting hereon your declination to join for your client in the application for the writ, we will ask for an order of severance permitting us alone to take out said writ of error and to receive benefits of supersedeas.

This the 21st day of January, 1899.

SHIELDS & MOUNTCASTLE,
Sol's for Wilberforce Sully, A. B. Carhart, and Mrs. Mary Myton.

H. H. CARR,
Sol. for Travelers' Insurance Co.

Filed Jan'y 26, 1899.
ALEX. McMILLAN, *Clerk*,
By J. G. STUART,
Deputy Clerk.

Endorsed: American National Bank *et al. v.* Carnegie Land Co. *et al.* Notice. Came to hand same day issued, and executed by leaving a true copy of the within notice with Faw & Cox. This Jan'y 21, 1899. G. F. Campbell, D. S.

223 Filed Jan'y 26, 1899.
ALEX. McMILLAN, *Clerk*,
By J. G. STUART,
Deputy Clerk.

United States of America to American National Bank, a corporation with situs in Tennessee, organized under the laws of the United States;

Edgefield & Nashville Manufacturing Company, a corporation organized under the laws of Tennessee;

P. Fleming and —— ——, partners in trade as P. Fleming & Company;

A. S. Deaderick and J. H. Epps, partners under the name of Deaderick & Epps;

J. E. Reeves and E. J. Baxter, partners under the name of Reeves & Baxter;

H. H. Carr and E. C. Reeves, partners under the name of Carr & Reeves;

S. J. Kirkpatrick, S. C. Williams, and John H. Bowman, partners under the name of Kirkpatrick, Williams & Bowman;
J. W. Cure;
J. W. Cure, assignee of Carnegie Land Company;
Ace Hardin;
J. T. Wilder;
Wautauga Lighting & Power Company, a corporation organized under the laws of Tennessee;
R. W. Farr and wife, Laura Farr;
State of Tennessee;
Washington County;
224 Johnson City, a municipal corporation of Tennessee;
H. H. Carr;
Johnson City Foundry & Machine Works, a corporation organized under the laws of Tennessee;
W. H. Floyd;
H. C. Jarvis;
Jacob Leab, in his own right and as county court clerk, for the use of J. B. Miller, John E. Jones, Johnson City Comet, F. K. Mountcastle, J. C. Hentz, H. W. Hargroves, Oscar Wheeler, G. Hale, J. J. Young, Joseph Burrow, John King, Land C. Hoss, Joe P. Lyle, M. F. Hickey, F. W. Ernest, J. W. Myers, C. H. Jennings, J. H. Martin, T. T. Young, George St. John, C. C. Harris, and James M. Reeves;
A. R. Wing;
A. R. Wing, assignee of Cullen & Newman;
A. R. Wing, assignee of J. C. Cullen;
A. R. Wing, assignee of First National Bank of Chattanooga;
Curtis Cullen & C. S. Newman, doing business as Cullen & Newman;
J. C. Cullen;
First National Bank of Chattanooga, with situs in Tennessee, organized under the laws of the United States;
D. Weihl and H. S. Probasco, doing business under the name of Weihl, Probasco & Company;
J. S. Shields, J. T. Shields, Jr., and M. L. Shields, doing business under the name of Shields Brothers;
W. B. Lockett, A. Percy Lockett, and Edward Lockett, doing business under the name of W. B. Lockett & Company;
S. J. Kirkpatrick and S. C. Williams, partners under the name of Kirkpatrick & Williams;
L. T. Duke;
W. G. Mathes, assignee of Citizens' Bank of Johnson City, a
225 corporation organized under the laws of Tennessee;
A. R. Wing, assignee of H. S. Chamberlain;
H. S. Chamberlain;
A. R. Wing, assignee of Jonesboro Banking & Trust Company, a corporation organized under the laws of Tennessee;
Jonesboro Banking & Trust Company;
George T. McNeill;
Knoxville Provision & Sugar Company, a corporation organized under the laws of Tennessee;

J. H. Brown and A. B. Biddle, partners under the name of Brown & Biddle;
John I. Cox, receiver First National Bank of Johnson City, Tennessee;
Ralph Boyd,
J. H. Prees,
Carnegie Land Company,
Cy. H. Lyle,
Carnegie Iron Company,
Carnegie Land Company,
the above being Tennessee creditors;
Scioto Star Fire Brick Works, a corporation organized under the laws of Ohio;
Connecticut Trust & Safe Deposit Company, trustee, corporation of Conn.;
R. A. Wickersham;
J. S. Page, Luther Dennis, and —— ——, partners, doing business in New York city as Page, Dennis & Company;
S. C. Williams, assignee of Page, Dennis & Company;
Frame King, a resident of the State of Texas:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, as Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, wherein Wil-
226 berforce Sully, trustee; Wilberforce Sully, in his own right; Alfred B. Carhart, Mrs. Mary P. Myton, and Travellers' Insurance Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David L. Snodgrass, chief justice of the supreme court of Tennessee, this 25th day of January, in the year of our Lord eighteen hundred and ninety-nine.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

Filed Jan'y 26, 1899.
ALEX. McMILLAN, *Clerk*,
By J. G. STUART, *Deputy Clerk.*

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:
Kirkpatrick, Williams & Bowman.
J. T. Wilder.
A. R. Wing.
A. R. Wing, assignee of Cullen & Newman.
A. R. Wing, assignee of Carnegie Iron Company.
Carnegie Iron Company.
Wilberforce Suliy, assignee of Maiden and wife.

Page, Dennis & Company.
227 D. Weihl and H. S. Probasco.
W. G. Mathes, assignee of the Citizens' Bank of Johnson City.
A. R. Wing, assignee of H. S. Chamberlain.
A. R. Wing, assignee of J. C. Cullen.
A. R. Wing, assignee of First National Bank of Chattanooga.

By KIRKPATRICK, WILLIAMS & BOWMAN, *Solicitors.*

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:

American National Bank.
Jas. T. Shields, Jos. S. Shields, Milton L. Shields, doing business as Shields Brothers.
Scioto Star Fire Brick Works.

DEADERICK & EPPS,
By J. H. EPPS.
E. J. BAXTER,
Surviving Partner of Reeves & Baxter, Sol's.

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:

Jonesboro Banking & Trust Company.
Kirkpatrick & Williams.

By KIRKPATRICK, WILLIAMS & BOWMAN, *Sol's.*

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:

228 Edgefield & Nashville Manufacturing Company.

By JAUROLMAN, WELKER & HUDSON, *Sol's.*

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:

Wautauga Lightning & Power Company.

By KIRKPATRICK, WILLIAMS & BOWMAN, *Sol's.*

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:

State of Tennessee.
Johnson City Foundry & Machine Works.
W. H. Floyd.
J. C. Cullen.
W. B. Lockett & Company.

John I. Cox, receiver of First National Bank of Johnson City.
R. A. Wickersham.

FAW & COX,
By W. W. FAW.

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:
Knoxville Provision & Sugar Company.
Brown & Biddle.

Servise excepted.

A. B. BIDDLE,
For BROWN & BIDDLE.

229 Johnson City.

W. J. EXUM, *Mayor.*
WM. G. MATHES, *Recorder.*

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:
Mrs. Laura Farr.
R. W. Farr.

W. W. FAW.

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:
W. G. Mathes, assignee of the Citizens' Bank of Johnson City.
George T. McNiell.
Carnegie Land Company.

CARR & REEVES, *Sol's,*
Per E. C. REEVES.
E. C. REEVES, *Sol.*
H. H. CARR, *Sol.*

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:
Ralph Boyd.
J. H. Preas.
Frame King.

ISAAC HARR, *Sol.*

230 We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:
S. J. Kirkpatrick.
S. C. Williams.
John H. Bowman. By S. C. WILLIAMS, *Sol.*
Isaac Harr. ISAAC HARR.

Robert Burrow.	Appearance entered. ROB'T BURROW.
W. W. Faw.	Service accepted & appearance entered. W. W. FAW.
Thad. A. Cox.	Service accepted & appearance entered. T. A. COX.
E. C. Reeves.	Service accepted & appearance entered by— E. C. REEVES.
Samuel M. Arnell.	Service accepted. S. M. ARNELL.
H. H. Carr.	Service accepted & appearance entered. H. H. CARR, *For Self.*
E. J. Baxter.	Service accepted & appearance entered. E. J. BAXTER.
E. J. Baxter, surviving partner of Reeves & Baxter.	Service accepted & appearance entered. E. J. BAXTER.
A. S. Deaderick.	A. S. DEADERICK, By J. H. EPPS.
James H. Epps.	JAMES H. EPPS.
Deaderick & Epps.	DEADERICK & EPPS.
Washington County.	S. A. BYRD, *Trustee for Washington County.* CHAS. S. MASON, *County Court Clerk for Washington County.*
Curtis Cullen and C. S. Newman, doing business as Cullen & Newman.	
231 First National Bank of Chattanooga.	
L. T. Duke.	Service accepted. L. T. DUKE.
H. S. Chamberlain.	H. S. CHAMBERLAIN.

We hereby acknowledge service of the within and foregoing citation for and on behalf of the following persons named therein, to wit:

Jacob Leab, in his own right and as county court clerk, for the use of J. B. Miller, John M. Jones, Johnson City Comet, F. K. Mountcastle, J. C. Hentz, H. W. Hargraves, Oscar Wheeler, G. Hale, J. J. Young, Joseph Burrow, John King, Land. C. Hoss, Joe P. Lyle, M. F.

Hickey, F. W. Earnest, J. W. Myers, C. H. Jennings, J. H. Martin, T. T. Young, George St. John, G. C. Harris, and James M. Reeves.

JACOB LEAB.

J. W. Cure.
J. W. Cure, assignee Carnegie Land Co.

Service accepted.

J. W. CURE.

A. R. Wing, assignee of Jonesboro Banking & Trust Company.
Cy. H. Lyle.
H. C. Jarvis.

Appearance entered by—

ROBT BURROW, *Sol.*

Service accepted.

CY. H. LYLE.

Order Enlarging Time.

For good cause shown to me, and upon the application of the plaintiffs in error named in the within citation, the time for filing the record in this cause with the clerk of the Supreme Court
232 of the United States and the time for the appearance of the defendants in error to show cause, as cited and admonished in said citation, is enlarged and extended for thirty (30) days from this date.

Witness the Honorable David L. Snodgrass, chief justice of the supreme court of Tennessee, this the 4th day of March, in the year of our Lord eighteen hundred and ninety-nine.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

233 In the Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
v.
CARNEGIE LAND COMPANY ET AL.

And consolidated causes.

Order of Severance.

Upon the presentation of the application of Wilberforce Sully, trustee; Alfred B. Carhart, Wilberforce Sully in his own right, Mrs. Mary P. Myton, and Travelers' Insurance Company for a writ or writs of error to the Supreme Court of the United States from the judgment of the supreme court of Tennessee in the above-entitled cause, it was made sufficiently to appear that all of the other parties in like interest were notified of the purpose of the appellants named to apply for said writ on this day, and it further appears that one of said parties, Frame King, has accepted service of said notice and declined to join in the application for said writ, and that the re-

mainder of said parties in like interest were duly notified that an order of severance would be asked for on this date in the event they failed to join in the application for said writ; and said parties having failed to join in said application—

It is thereupon ordered that a severance be granted to said Wilberforce Sully, trustee; Alfred B. Carhart, Wilberforce Sully in his own right, Mrs. Mary P. Myton, and Travelers' Insurance Company, to whom alone the writ is allowed, and only as against whom
234 the supersedeas of the execution pronounced in said cause shall become effective.

Allowed January 25, 1899.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

Filed Jan'y 26, 1899.
ALEX. McMILLAN, *Clerk*,
By J. G. STUART,
Deputy Clerk.

235 & 236 Filed Jan'y 26, 1899. Alex. McMillan, clerk, by J. G. Stuart, deputy clerk.

Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

and

WILBERFORCE SULLY, Trustee, ET AL.
vs.
CARNEGIE LAND COMPANY ET AL.

Know all men by these presents that we, Wilberforce Sully, trustee; Alfred B. Carhart, Wilberforce Sully in his own right, and Mrs. Mary P. Myton, principals, and the American Surety Company, surety, are held and firmly bound unto the American National Bank and others in the penal sum of two thousand five hundred dollars ($2,500.00), to be paid to the said American National Bank and others, their heirs and assigns; for which payment, well and truly to be made, we bind ourselves and each of us and each and every of our several heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals on this the 16th day of January, 1899.

Whereas the above-named Wilberforce, Sully, trustee;
237 Alfred B. Carhart, Wilberforce Sully in his own right, and Mrs. Mary P. Myton have prosecuted a writ of error to the United States Supreme Court, to be holden at Washington, to reverse the decree rendered in the above-entitled suit in said court by the judges of the supreme court of Tennessee:

Now, therefore, the condition of this obligation is such that if the above-named Wilberforce Sully, trustee; Alfred B. Carhart, Wilberforce Sully in his own right, and Mrs. Mary P. Myton shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WILBERFORCE SULLY, *Trustee.*
WILBERFORCE SULLY.
AMERICAN SURETY COMPANY OF NEW YORK,

[Seal of American Surety Co.]

By H. D. LYMAN, *Vice-President.*
CORTLANDT S. VAN RENSSELAER, *Attorney.*
ALFRED B. CARHART AND
MARY P. MYTON,
By QUINCY WARD BOESE, *Att'y.*

Sealed and delivered in the presence of—
—— ——.

Approved as to form, and also as to sufficiency of sureties, with reservation, however, to the American National Bank *et al.* of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities, and financial condition generally.

[Seal U. S. Circuit Court, Southern Dist. New York.]

JOHN A. SHIELDS,
Clerk Circuit Court of the United States
for the Southern District of New York.

238 Approved:
D. L. SNODGRASS,
C. J. Sup. Ct. Tenn.

STATE AND COUNTY OF NEW YORK, *ss:*

On this 16th day of January, 1899, before me personally appeared H. D. Lyman, vice-president of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order, and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law; and the said H. D. Lyman further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation; that the

signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument is in the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said H. D. Lyman, vice-president.

[Seal of K. J. Peircey, Notary Public, Kings County.]

K. J. PEIRCEY,
Notary Public, Kings Co.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, & Rockland Cos.

239 At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be, and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed, such guarantee, bonds, and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 16th day of January, 1899.

[Seal of American Surety Company, New York.]

CORTLANDT S. VAN RENSSELAER, *Attorney.*

240 In the Supreme Court of Tennessee.

AMERICAN NATIONAL BANK ET AL.
vs.
CARNEGIE LAND CO. ET AL.

and

WILBERFORCE SULLY, Trustee, ET AL.
vs.
CARNEGIE LAND CO. ET AL.

Know all men by these presents that we, The Travelers' Insurance Company of Hartford, Connecticut, principal, and Webb & Mc-

Clung and H. H. Carr, sureties, are held and firmly bound unto the American National Bank and others in the penal sum of two thousand five hundred dollars ($2,500.00), to be paid to the said American National Bank and others, their heirs and assigns; for which payment, well and truly to be made, we bind ourselves and each of us and each and every of our several heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals on this the 20th day of January, 1899.

Whereas the above-named Travelers' Insurance Company has prosecuted a writ of error to the Supreme Court of the United States, to be holden at Washington, to reverse the decree rendered in the above-entitled suit in said court by the judges of the supreme court of Tennessee:

Now, therefore, the condition of this obligation is such that if the above-named Travelers' Insurance Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and
241 virtue.

Witness our hands the day and year first above written.

THE TRAVELERS' INSURANCE COMPANY,
By WEBB & McCLUNG, *Att'ys.*
WEBB & McCLUNG.
H. H. CARR.

Allowed:
D. L. SNODGRASS,
Ch. J. Sup. Ct. Tenn.

Filed Jan'y 26, 1899.
ALEX. McMILLAN, *Clerk*,
By J. G. STUART, *D. C.*

242 Filed Jan'y 26, 1899. Alex. McMillan, clerk, by J. G. Stuart, deputy clerk.

Circuit Court of the United States, Eastern District of Tennessee, Northern Division.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

The President of the United States to the honorable the judges of the supreme court of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit in which The American National Bank, a Tennessee corporation; J. S. Shields, J. T. Shields, Jr., and M. L. Shields, doing business under the name of Shields Brothers, and The Scioto

Star Fire Brick Works, a corporation under the laws of Ohio, were complainants, and The Carnegie Land Company, John W. Cure, J. T. Wilder, The First National Bank of Johnson City, R. W. Farr, Cy. H. Lyle, H. H. Carr, Carnegie Iron Company were defendants, and also in which Wilberforce Sully, trustee, A. B. Carhart,
243 were complainants, and The Carnegie Land Company, Travelers' Insurance Company, and Connecticut Trust & Safe Deposit Company were defendants, being consolidated causes, and in which the following-named parties were intervening petitioners, to wit:

Edgefield & Nashville Manufacturing Co., a Tennessee corporation;

P. Fleming and —— ——, partners in trade as P. Fleming & Co.;

A. S. Deaderick and J. H. Epps, partners under the name of Deaderick & Epps;

J. E. Reeves and E. J. Baxter, partners under the name of Reeves & Baxter;

H. H. Carr and E. C. Reeves, partners under the name of Carr & Reeves;

S. J. Kirkpatrick, S. C. Williams, and John H. Bowman, partners under the name of Kirkpatrick, Williams & Bowman;

J. W. Cure;

J. W. Cure, assignee of Carnegie Land Company;

Ace Hardin;

J. T. Wilder;

Wautauga Lighting & Power Company, a Tennessee corporation;

R. W. Farr and wife, Laura Far;

State of Tennessee;

Washington County;

Johnson City;

H. H. Carr;

Johnson City Foundry and Machine Works;

W. H. Floyd;

H. C. Jarvis;

Jacob Leab, in his own right and as county court clerk, for the use of J. B. Miller, John E. Jones, Johnson City Comet, F. K. Mountcastle, J. C. Hentz, H. W. Hargroves, Oscar Wheeler, G. Hale, J. J. Young, Joseph Burrow, John King, Land C. Hoss, Joe P. Lyle, M. F. Hickey,
P. W. Earnest, J. W. Myers, C. H. Jennings, J. H. Martin,
244 T. T. Young, George St. John, C. C. Harris, and James H. Reeves;

A. R. Wing;

A. R. Wing, assignee of Cullen & Newman;

A. R. Wing, assignee of J. C. Cullen;

A. R. Wing, assignee of First National Bank of Chattanooga;

Cullen & Newman, partners, composed of Curtis Cullen and C. S. Newman;

J. C. Cullen;

First National Bank of Chattanooga;

D. Weihl and H. S. Probasco, doing business under the name of Weihl, Probasco & Co.;
W. B. Lockett, A. Percy Lockett, and Edward Lockett, doing business under the name of W. B. Lockett & Co.;
S. J. Kirkpatrick and S. C. Williams, partners under the name of Kirkpatrick & Williams;
L. T. Duke;
W. G. Mathes, assignee of Citizens' Bank of Johnson City;
A. R. Wing, assignee of H. S. Chamberlain;
H. S. Chamberlain;
A. R. Wing, assignee of Jonesboro Banking & Trust Co.;
Jonesboro Banking & Trust Co.;
George T. McNeil;
Knoxville Provision & Sugar Co.;
J. H. Brown and A. B. Biddle, partners under the name of Brown & Biddle;
John I. Cox, receiver of the First National Bank of Johnson City;
Ralph Boyd;
J. H. Prees;
Carnegie Land Company;
W. E. Maiden and wife, Martha A. Maiden;
R. A. Wickersham;
245 Page Dennis & Co.;
S. C. Williams;
Frame King;

wherein Wilberforce Sully, trustee; Wilberforce Sully in his own right, Alfred B. Carhart, and Mrs. Mary P. Myton, all citizens and residents of the State of New York, and Travelers' Insurance Company, a Connecticut corporation, a resident and citizen of the State of Connecticut, are parties in interest and to said causes, wherein was drawn into question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Wilberforce Sully, trustee; Wilberforce Sully in his own right, Alfred B. Carhart, Mrs. Mary P. Myton, and Travelers' Insurance Company, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the third Monday of February next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Circuit Court, District of East Tennessee.]

246 HENRY O. EWING, *Clerk*,
By J. T. CARTER, *Dep. Clerk*,
United States Circuit Court, Eastern District of Tennessee.

Allowed by—
D. L. SNODGRASS,
Chief Justice Supreme Court Tennessee.

A true copy of the above and foregoing writ of error was lodged with me in this office of the clerk of the supreme court of Tennessee, at Knoxville, on January 26th, 1899, at 10 o'clock a. m.

ALEX. McMILLAN, *Clerk*,
By J. G. STUART,
Deputy Clerk.

247 In the Supreme Court of the United States of America, upon Writs of Error to the Supreme Court of the State of Tennessee.

WILBERFORCE SULLY ET ALS.
vs.
AMERICAN NATIONAL BANK ET ALS.

Stipulation of Counsel in Respect to the Portions of the Record to be Printed.

The parties appellant and defendant, by their respective solicitors, agree that the following parts of the record shall be printed, and none other; which printed parts, together with the stipulation of the parties contained in this agreement, shall be submitted as the record of the cause.

I.

The Carnegie Land Company is a foreign corporation organized for mining and manufacturing purposes, incorporated under the laws of the State of Virginia on the 24th day of June, 1889, and had, prior to the filing of the bill in this cause, to wit, in the year —, the date of which it began business in the State of Tennessee, registered its charter in the said State of Tennessee under the provisions of the act of the General Assembly of the State of Tennessee passed March 19th, 1877, chapter 31, Acts of the Assembly Session 1877. Said Carnegie Land Company purchased and held an estate and transacted its business affairs at Johnson City, in said State, in compliance with the provisions of the said act of 1877, chapter 31, declaring the terms upon which such corporations were permitted to carry on business in Tennessee and purchase, hold, and convey real and personal property in said State.

II.

That on the 27th day of November, 1893, the American National Bank and others filed an original general creditors' bill in
248 the chancery court of Washington county, Tennessee, at Johnson City, against said Carnegie Land Company and others, alleging the insolvency of said company; that it was unable to meet and discharge its obligations; that it had made an assignment of all of its property in Tennessee, without recognizing in said assignment the priority given to resident Tennessee creditors in and by said act of 1877, chapter 31, and seeking the appointment of a receiver and the administration of the affairs of said Carnegie Land Company as an insolvent corporation. The Travelers' Insurance Company and Wilberforce Sully and A. B. Carhart were not named as defendants to said bill. Said chancery court took jurisdiction of the cause, sustained said bill as a general creditors' bill, and administered the affairs of said corporation and passed decrees adjudicating the rights and priorities of creditors. On May 28th, 1895, Wilberforce Sully, trustee, and A. B. Carhart filed their original bill in said court against the Carnegie Land Company and others to foreclose the mortgage registered February 10th, 1893, thereinafter described and referred to. This cause was, by consent, consolidated with the cause of the American national bank and others, and the two causes were heard together.

No question is now made as to the amount adjudged to be due to any one of the creditors by the chancellor's decree of September 3rd, 1896, as modified by the decree of the supreme court of Tennessee and the court of chancery appeals of Tennessee.

The following-named creditors, whose claims were adjudged by said decree, are resident Tennessee creditors within the meaning of said act of 1877, chapter 31:

Names.	Residences.
State, county, and municipal taxes	Tennessee.
Edgefield & Nashville Mfg. Co.	"
P. Fleming & Co.	"
Costs, counsel fees, etc.	"
American national bank	"
H. H. Carr & E. C. Reeves	"
State & county privilege taxes	"
249 Watauga Light & Power Co.	"
R. W. & Laura Farr	"
Johnson City Foundry Machine Works	"
W. H. Floyd	"
H. C. Jarvis	"
Kirkpatrick & Williams	"
A. R. Wing	"
A. R. Wing, assignee of J. C. Cullen	"
A. R. Wing, assignee of First national bank, Chattanooga	"
Weihl, Probasco & Company	"

State & county privilege taxes		Tennessee.
Shields Brothers		"
W. B. Lockett & Company		"
L. T. Duke		"
Jacob Leab, county court clerk		"
W. G. Matthews, assignee Citizens' bank		"
A. R. Wing, assignee of H. S. Chamberlain		"
A. R. Wing, assignee of Jonesboro B. & T. Co.		"
George T. McNeil		"
R. W. Farr		"
Knoxville Provision & Sugar Company		"
J. H. Preas		"
Brown & Biddle		"
Ralph Boyd		"
John I. Cox, receiver of First national bank		"

And the following-named creditors, whose claims were adjudged in said decree, are non-resident creditors within the meaning of said act:

Sciota Star Brick Works		Ohio.
Travelers' Insurance Co. mortgage		Connecticut.
R. A. Wickersham		Non-resident.
Page, Dennis & Company		New York.
Wilberforce Sully, assignee of E. C. Manning		New York.
Mrs. Mary P. Myton		New York.
A. B. Carhart		"
	Wilberforce Sully, trustee	"
250	A. B. Carhart, mortgage	New York.
	Carnegie Iron Co. (A. R. Wing, assignee), judgment U. S. circuit court	Virginia.
Frame King		Texas.
Travelers' Insurance Co. (insurance)		Connecticut.

Of the amounts adjudged to be due to the above-named resident creditors of Tennessee the sum of $29,377.36 accrued prior to November 23rd, 1891, the date of the registration of the Travelers' Insurance Co.'s mortgage; the sum of $13,794.35 accrued after November 23rd, 1891, and before February 10th, 1893, the date of registration of the mortgage made to Wilberforce Sully, trustee, and the sum of $1,860.97 accrued after Feb. 10th, 1893.

Of the amounts adjudged to be due to the above-named non-resident creditors the sum of $35,406.19 was due the Travelers' Insurance Company, a corporation under the laws of the State of Connecticut, and was secured by a valid mortgage from the Carnegie Land Company, dated, acknowledged, and duly registered in Washington county, Tennessee, on the 23rd day of November, 1891, while said company was a solvent and going concern, and covering the following-described real and personal property, situated in said Washington county, to wit, situated and being in the Carnegie Land & Improvement Co.'s addition to Johnson City, Washington county, Tennessee, to wit:

First. Lots numbers one (1), two (2), three (3), four (4), five (5), six (6), seven (7), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), and twenty-three (23), in block six (6) of said addition, bounded on the south by First avenue, on the west by Central street, on the north by Second avenue, and on the east by lots eight (8) and twenty-four (24), together with all and singular the improvements thereon, consisting in part of a three-story brick hotel building, with stone basement containing six store-rooms.

251 Second. All and singular the furniture, property, fixtures, and appliances in and belonging to said hotel, consisting of beds, bedding, carpets, tables, chairs, settees, lounges, sofas, window curtains, table ware, kitchen furniture, etc., all of which was then in use in said hotel building.

And of the amounts adjudged to be due said non-resident creditors there was due to Wilberforce Sully, trustee, and A. B. Carhart, mortgage residents of the State of New York, the sum of $105,124.99, and said sum was secured by a valid mortgage from the Carnegie Land Co., duly executed, acknowledged, and registered in said Washington county, Tenn., on the 10th day of February, 1893, while said company was a going concern, covering all of the property covered by said mortgage of November 23rd, 1891, to the Travelers' Insurance Co. and also covering all other property, real and personal, owned by said Carnegie Land Co. and being in said Washington county, except specified portions excepted and reserved, all of which is sufficiently and in detail described and shown in said mortgage of February 10th, 1893. But this mortgage of February 10th, 1893, was on its face expressly made subject and subordinate to said mortgage of November 23rd, 1891.

Nothing in this stipulation is intended to have or shall have the effect of an admission by the resident Tenn. creditors that said mortgages or either of them constituted a lien on said property superior to the claims of said resident creditors or a right to priority or satisfaction out of the proceeds, but said resident creditors expressly claim a priority over said mortgages under the said act of 1877, chapter 31.

The total indebtedness of said Carnegie Land Co. amounts to about the sum of $271,321.55, and the total value of its assets is about the sum of $66,123.31.

III.

252 Publication was made requiring all persons claiming to be creditors of said corporation to intervene in said chancery court and set up their claims against said company.

The controversy in this court is between resident creditors and non-resident creditors and between resident creditors and mortgage creditors as to priorities under said act of 1877, chapter 31, in the distribution of the assets of the Carnegie Land Company depending upon the constitutional questions made in and decided by the supreme court of Tennessee.

It is agreed that only the following parts of the record, which is

all of the record that is essential to the determination of the issues raised in this court by the assignments of error, shall be printed, to wit:

1st. The original bill of the American national bank as it appears.

See Tr., vol. 1, pages 2–13.

2nd. Demurrer and answer of J. W. Cure adopted by Carnegie Land Co.

See Tr., vol. 1, pages 59–68.

3rd. The original bill of Wilberforce Sully, trustee, and A. B. Carhart.

See Tr., vol. 1, pages 212–232.

4th. Answer of American national bank and others to Sully's bill.

See Tr., vol. 2, pages 292–296.

5th. Answer of Travelers' Insurance Co. to Sully's bill.

See Tr., vol. 2, pages 297–299.

6th. Intervening petition of Travelers' Insurance Co.

See Tr., vol. 1, pages 81, 82.

7th. Amended petition of Travelers' Insurance Co.

See Tr., vol. 2, pages 411–414.

8th. Petition of Mary P. Myton and A. B. Carhart.

Tr., vol. 2, pages 333–335.

8th (*a*). Decretal order of reference of date June 7th, 1894.

Tr., vol. 1, pages 102–104 *et seq.*

253 9th. Chancellor's decree of July 3rd, 1896.

Tr., vol. 5, pages 1571–1582.

10th. Chancellor's final decree of September 3rd, 1896, omitting master's report.

Tr., vol. 6, pages 1877–1925, except pages 1878–1916, covering said report.

11th. Notice of writ of error and acceptance of service.

Tr., vol. 6, pages 2129–2137.

12th. Opinion of court of chancery appeals.

Tr., vol. 6, pages 1960–2005.

13th. Decree of court of chancery appeals.

Tr., vol. 6, pages 2017–2020.

14th. Page 19 of the printed assignments of error of Sully, trustee, and A. B. Carhart, attached to and certified between pages 2078–2079, vol. 6 of the transcript, referring to the unconstitutionality of the act of 1877, chapter 31.

15th. Decree of the supreme court of Tennessee.

Tr., vol. 6, pages 2099–2101.

16th. The assignments of error filed in the supreme court of Tenn. on behalf of the appellants.

Tr., vol. 6, pages 2025–2038 and 2052–2078.

17th. Notice to join in the application for writs of error and service and acknowledgment of same.

Tr., vol. 6, pages 2109½, six pages between 2109 and 2110.

18th. Copy of citation served on complainants, defendants, and petitioners, and all other parties, and a copy of the several acceptances of service.

Tr., vol. 6, pages 2129–2137.

19th. The order of severance, bonds, and writs of error.

Tr., vol. 6, pages 2105, 2117, and 2102, 2103 and 2106–2109.

IV.

It is further stipulated that neither Wilberforce Sully, trustee, A. B. Carhart, Mary P. Myton, nor E. C. Manning proved or attempted by evidence to show in what jurisdiction they were citizens respectively. Each of them did prove their respective residences to be as indicated above.

254 The record of the cause does not show that the Travelers' Insurance Company had complied with the act of Tennessee, 1877, chapter 31, or acts amendatory thereof, or that it had any office, officer, or agency in Tennessee subject to process. The indebtedness secured to Travelers' Insurance Company by the mortgage in question arose out of a loan of money by it to Carnegie Land Company at Hartford, Connecticut.

The Carnegie Land Company executed a general assignment to secure its creditors on June 5th, 1893.

ISAAC HARR, *Sol.*
J. A. COX (*Sol.*).
ROB'T BURROW.
SAMUEL M. ARNELL,
Sol. for Cullen et al., Page, Dennis & Co., J. C. Foundry Works.
DEADERICK & EPPS,
Sol'rs for Compl'ts in O. Bill.
E. J. BAXTER.
SHIELDS & MOUNTCASTLE.
WEBB & McCLUNG, *Sol'rs for Travelers' Ins. Co.*
H. H. CARR.
KIRKPATRICK, WILLIAMS & BOWMAN, *Sols.*
JOHN K. SHIELDS,
R. E. L. MOUNTCASTLE,
For Sully, Trustee, & Carhart & Others.
JAUROLMAN, WELKER & HUDSON,
Sols. for E. & N. Mfg. Co.

255 [Endorsed:] File No., 17,373. Supreme Court U. S., October term, 1899. Term No., 266. Wilberforce Sully, trustee, &c., *vs.* The American National Bank *et al.* Stipulation of counsel in respect to the portions of the record to be printed. Filed Sept. 21, 1899.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 266.

WILBERFORCE SULLY, TRUSTEE, &c., ET AL.,
PLAINTIFFS IN ERROR,

vs.

THE AMERICAN NATIONAL BANK ET AL.

ADDITIONAL EXTRACTS TO FORM RECORD.

(Record, p. 924.)

Extract from Clerk and Master's Report.

Wilberforce Sully, who resides in New York, N. Y.—Debt due by judgment in the cause of E. C. Manning *vs.* Carnegie Land Co., rendered in favor of E. C. Manning, a resident in Washington, D. C., in said cause on the 29th day of June, 1895, and assigned by said Manning and Deaderick & Epps & N. Hacker, solicitors for said Manning, to said Sully on the 23rd and 25th days of January, 1896, to wit:

Judgment, June 29th, 1895		45,445.89
Interest on same to February 10th, 1896		1,673.92
Amount at that date		$47,119.81
Credit at that date by amount of proceeds of land sold for satisfaction of said judgment on said sale confirmed to said Sully by decree of March 3rd, 1896, to wit:		
Amount of his bid	2,000.00	
Less costs of cause paid	100.73	
		1,899.27
Leaving balance at that date		45,220.54
Interest on same to March 20th, 1896		301.47
		45,522.01

The bill in said cause of E. C. Manning *vs.* Carnegie Land Co. was filed March 29th, 1892, and defendant's liability to him arose out of a contract of sale, Exhibit A to said bill, dated March 22, 1890.

See bill in said Manning case, pages 1, assignor, and Exhibit A thereto; decree of June 29th, 1895; record No. 3, pages 45 to 47; assignment to said Sully, on file, and decree of March 3rd, 1896; record No. 3, pages 201 & 202.

A. B. Carhart, of Brooklyn, N. Y., and Mrs. Mary P. Myton, of Amityville, Long Island, N.Y., in their petition filed October 11th, 1895, claim debt due them as follows:

To Mary P. Myton, by note dated May 25th, 1893, and due one day after date for		10,141.67
Interest on same to November 27th, 1894		922.87
Which would make it at that date		11,064.54
And with credits at that date from sale of bonds of Carnegie Land Co	4,495.00	
And of Carnegie Iron Co	2,475.00	
		6,970.00
Leaving balance at that date of		4,094.54
Which with interest to March 20th, 1896		322.78
Would make the sum of		4,417.32

(See petition and note, Exhibit A thereto.)

This note, it appears, was a renewal note given in renewal of a note dated October 26th, 1892.

Dep. of Wilberforce Sully, page 27; last dep. of J. W. Cure, page 8; dep. of A. B. Carhart, page 9.

And the consideration of it was borrowed money or the payment of a check drawn by J. T. Wilder, as president of the Co., on Alfred Sully. See deposition above cited; and—

To A. B. Carhart, by note dated March 1st, 1893, and due on demand for		14,046.66
Interest on same to November 27th, 1894		1,467.87
Which would make at that date		15,514.53
And with credit at that date from sale of bonds of Carnegie Land Co		8,400.00
Leaving balance at that date		7,114.53
Which *would* further credit of amount due company for land		4,865.87
Would leave balance at that date		2,248.66
Which with interest to March 10th, 1896		177.27
Would make the sum of		2,425.93

(See petition & note, Exhibit B thereto.)

This note was given, it appears, for two notes of the Carnegie Land Co., which had been held by the Citizens' bank, of $6,000.00, each dated October 7th, 1892, and due four months after date and endorses by Alfred Sully, and a two-thousand-dollar draft of J. T. Wilder, president, on Wilberforce Sully, treasurer, alleged to have been paid by said Carhart on the 3rd, 9th, & 28th days of February, 1893.

(See deposition of Sully, pages 7 & 8, & original notes exhibited therewith; dep. of J. W. Cure, page 11; dep. of A. B. Carhart, pages 2 & 3.)

* * * * * * *

(Record, p. 1853.)

Extracts from Exceptions of Travellers' Insurance Company to the Master's Reformed Report.

Exceptions, American Bank *et al. vs.* Carnegie Land Co. *et al.*, H. H. Carr, sol. for Travellers' Insurance Company. Filed Aug. 29th, 1896. C. W. Hodge, D. C. & M.

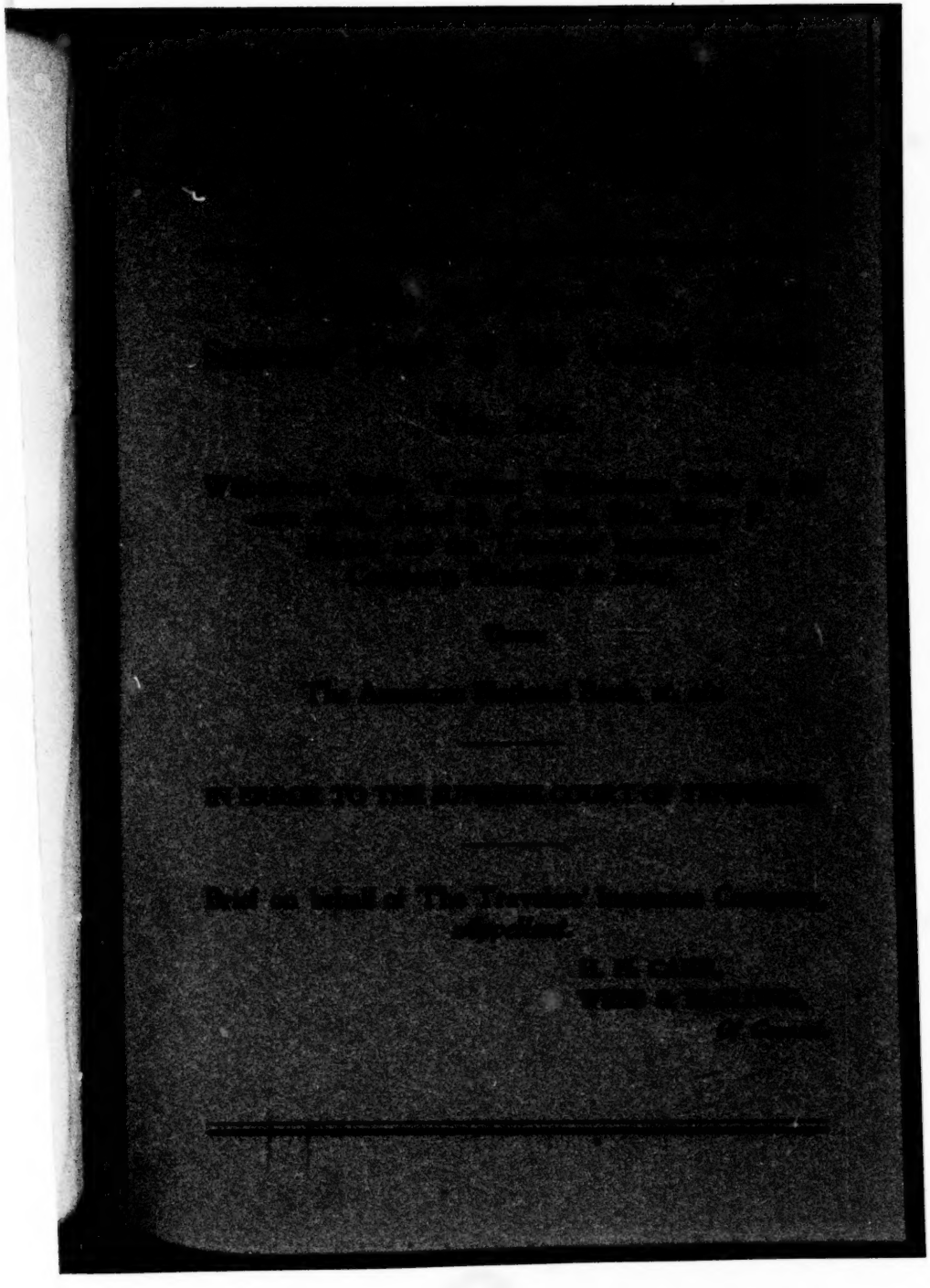
Exceptions by the Travellers' Insurance Company to the master's report filed in the cause of The American National Bank *et al. vs.* Carnegie Land Company *et al.* on Aug. 22nd, 1896.

1st exception. For that the master in his said report, on page three, reports as a part of the assets for distribution the $25,000.00 bid by the Travellers' Insurance Company for the hotel property. This is error. See the master's report of sale found in the decree of December 9th, 1895, in this cause. Entered of record in Minute Book 3, pages 150, 151, 152, 153, etc. See the deed of trust filed in this cause, Travellers' Insurance Company, on 23rd day of June, 1896. The bid on this property by the Travellers' Insurance Company being an offer to credit its debt with the amount of its bid, the master should have reported this as a fund for the payment of the debt due the Travellers' Insurance Company and not as a part of the general assets for distribution among the creditors.

The act of legislature of Tennessee, session of 1877, chapter 31, is in conflict with the Constitution of the United States, which declares "No State shall make or enforce any law which shall abridge the privileges or immunities of any of the citizens of the United States." Constitution U. S., art. 14, sec. 1. Also, "The citizens of each State shall be entitled to all the privileged and immunities of the citizens of the several States." Section 2, art. 4, Constitution of the U. S.

Under the act of 1877, ch. 31, these corporations may mortgage their property to secure Tennessee creditors and the mortgage is good, but if the mortgage is in favor of the foreign creditors it is not good as against Tennessee creditors. The act undertakes to create in privilege of a Tennessee citizen which denied a citizen of another State.

* * * * * * *



(17,373.)

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 266.

Wilberforce Sully, Trustee; Wilberforce Sully in his own right, Alfred B. Carhart, Mrs. Mary P. Myton and The Travelers' Insurance Company, Plaintiffs in Error,

versus

The American National Bank et al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF ON BEHALF OF APPELLANT, THE TRAVELERS' INSURANCE COMPANY, OF HARTFORD, CONNECTICUT.

PRELIMINARY STATEMENT.

The printed record in this cause is an abreviation of the transcript sent up from the Supreme Court of Tennessee, as appears from the stipulation of counsel found on page 142 of the printed record. By mistake, the assignments of error to the decree of

the Supreme Court of Tennessee, which were filed in that Court in support of the application for writ of error, were omitted from the printed record. To supply this omission the parties have made and entered into another stipulation to the effect that the omitted assignments of error may be printed with the briefs of counsel with like effect, as if the same had been printed in the printed record. This second stipulation of counsel and the assignments of error will be found printed in full in the appendix to this brief.

STATEMENT OF THE CASE.

The Carnegie Land Company was incorporated under the laws of the State of Virginia, on the 24th day of June, 1889, as a mining and manufacturing company. Its business and principal offices were in Washington county, Tennessee. The act of the Legislature of Tennessee, passed March 19th, 1877, being Chapter 31 of the Acts of 1877, prescribed the terms upon which foreign corporations might do business in the State of Tennessee. Among other things a foreign corporation was required to register its charter in the State of Tennessee. It is conceded that said Carnegie Land Company complied with this provision of the statute, so as to enable it to do business in the State of Tennessee, and did transact its business affairs at Johnson City in said State in compliance with the provisions of said Act.

Stipulation of Counsel page 142 *of the Printed Record.*

On the 27th day of November, 1893, the American National Bank and others claiming to be creditors of the Carnegie Land Company filed a general creditors bill in the Chancery Court of Washington County, Tennessee, against the said Carnegie Land Company, alleging its insolvency and seeking to wind it up as an

insolvent corporation. The bill also alleged that said Land Company had made an assignment of all of its property in Tennessee, without recognizing in the assignment the priority given to resident Tennessee creditors, by said Act of 1877, Chapter 31. The Travelers Insurance Company, Wilberforce Sully and A. B. Carhart were not named as Defendants to said Bill. Said Chancery Court took jurisdiction of the cause and sustained said bill as a general creditors bill and administered the affairs of said corporation and pronounced decrees adjudicating the rights and priorities of creditors. On May 28th, 1895, Wiberforce Sully, Trustee, and A. B. Carhart filed their original bill in said Court against said Land Company and others seeking to foreclose a mortgage on the property of said Company which was registered February 10th, 1893. This mortgage covered the entire property of the Land Company and recited on its face that it was made expressly subject and subordinate to a mortgage of the Travelers' Insurance Company, dated and registered on the 23rd day of November, 1891, and covering that portion of said Land Company's property, known as the Carnegie Hotel property. The Travelers' Insurance Company and the trustee named in said mortgage, of November 23rd, 1891, were made parties defendant to this bill and answered the same.

> *See Stipulation, pages* 143, 144, *and* 145 *of the Printed Record, and see answer of the Travelers' Insurance Company and its Trustee, page* 31 *Printed Record.*

The Travelers' Insurance Company also filed its intervention as a creditor of said Land Company in said original cause of the American National Bank and others. *Printed Record page* 33.

This bill of Sully and Carhart and the original bill of the

American National Bank and others were consolidated and heard together. *Printed Record page* 143.

The final decree of the Chancellor was rendered September 3rd, 1896. *Printed Record page* 47.

This final decree pronounced judgments in favor of resident Tennessee creditors whose claims accrued prior to November 23rd, 1891, the date of the registration of the Travelers' Insurance Company's mortgage, amounting to $29,377.36. This decree also pronounced a judgment in favor of the Travelers' Insurance Company as non-resident creditor for the sum of $35.406.19. This decree further provided that out of the entire proceeds of the Land Company's property, including the Hotel property, mortgaged to the Travelers' Insurance Company, there should first be paid taxes, costs and counsel fees; and, second, all debts due to residents of Tennessee, which were contracted prior to November 23rd, 1891, the date of the Travelers' Insurance Company's mortgage; third, the remainder of the proceeds of the Carnegie Hotel property, mortgaged to the Travelers' Insurance Company should be applied on the mortgage debt of the Travelers' Insurance Company, thus postponing the mortgage debt of the Travelers' Insurance Company to the unsecured debts of the residents of Tennessee. *Printed Record page* 45.

On appeal from this decree, the Court of Chancery Appeals of the State of Tennessee pronounced a decree on September 15th, 1897, affirming the Chancellor's decree upon this point and giving the resident Tennessee creditors priority over the mortgage debt of the Travelers' Insurance Company. *Printed Record page* 84.

On the appeal to the Supreme Court of Tennessee from this decree of the Court of Chancery Appeals, the Supreme Court of

Tennessee, on November 19th, 1898, pronounced a decree affirming the Chancellor's decree and the decree of the Chancery Court of Appeals, upon this point and giving preference to the resident Tennessee general creditors over the mortgage debt of the Travelers' Insurance Company on the Hotel property. The contention in the Chancery Court and in the Court of Appeals and in the Supreme Court on behalf of the Travelers' Insurance Company and others was that the Act of 1877, Chapter 31, was unconstitutional, as being in violation of the Constitution of Tennessee, and also as being in violation of Article 4, Section 2 of the Constitution of the United States, and in violation of the 14th Amendment, Section 1 of the Constitution of the United States. All of said decrees were against that contention and hold that said Act of 1877 was not in violation of the Constitution of Tennessee, and was not in violation of the Constitution of the United States, and was a valid Act. *Printed Record page* 87.

The case is brought to this Court by Writ of Error to reverse the holding of the Supreme Court of Tennessee and to have said Act of 1877, Chapter 31 decreed invalid, as being in violation of the Constitution of the United States. The assignments of error of the Travelers' Insurance Company will be found in full in the appendix to this brief.

BRIEF.

I.

The contention which we shall make before this Court is that the decree of the Supreme Court of Tennessee, upholding said Act of 1877, Chapter 31 is erroneous, because said Act violates Section 1 of the 14th Amendment to the Constitution of the United States. The part of Section 1 of the 14th Amendment

upon which we rely to support our contention is as follows: "Nor shall any State deprive any person of life, liberty or *property without due process of law.*" The Act of 1877, Chapter 31 is entitled: "An Act to declare the terms on which foreign corporations organized for mining and manufacturing purposes may carry on their business and may purchase, hold and convey real and personal property in this State." Section 1 of the Act provides that such foreign corporations may carry on in this State the business authorized by their charters and do the things therein specified, upon the terms and conditions and in the manner and under limitations herein declared."

Section 2 of the Act provides that the corporation shall file a copy of its charter with the Secretary of State and then record an abstract of the charter in each county where the corporation proposes to carry on any business and to acquire any lands.

Section 3 is, "that such corporations shall be deemed and taken to be corporations of this State, and shall be subject to the jurisdiction of the Courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by the law directed in the case of corporations created or organized under the laws of this State."

Section 4 provides "That such corporations may purchase, acquire and hold real estate in fee or any other interest less than fee, and personal property of every kind" * * * "And may sell, lease and convey said real estate as natural persons may do."

Section 5 provides "That the corporations and the property of all corporations coming under the provision of this Act shall be liable for all the debts, liabilities and engagements of the said corporations, to be enforced in the manner provided by law for the application of the property of natural persons to the payment

of their debts, engagements and contracts. Nevertheless creditors who may be *residents of this State* shall have *a priority in the distribution of assets, or subjection of the same*, or any part thereof, *to the payment of debts* over all simple contract creditors, being residents *of any other country or countries*, and also over *mortgage or judgment creditors*, for all debts, engagements and contracts which are made or owing by said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid and shall constitute a prior lien on the property on which they are or may be charges as against all debts which may be incurred subsequent to the date of their registration or rendition."

The stipulation of counsel admits that on the 23d of November, 1891, when the Travelers' Insurance Company loaned $30,000.00 in cash to the Carnegie Land Company and took a mortgage on the hotel property to secure the same, the said Land Company was a solvent and going concern. *Printed record, page* 144.

It is manifest that the mortgage or judgment creditors whose claims are postponed to resident creditors are non-resident judgment or mortgage creditors, and that the language "being residents of any other country or countries," qualifying simple contract creditors, was also intended to qualify "mortgage or judgment creditors." This is the portion of the Act which the Travelers' Insurance Company claims has the effect to take its property without due process of law. On November 23d, 1891, the Carnegie Land Company had the right to borrow the $30,000.00 from the Travelers' Insurance Company, and had the right to give a valid mortgage upon its property to secure the loan. The money loaned by the Travelers' Insurance Company went into the bus-

iness of the Land Company and must have been applied either to the payment of its debts or to the betterment of its plant.

This Act of 1877, chapter 31, was considered by this Court in the case of *Blake vs. McClung*, 172 U. S., *page* 239.

The unconstitutionality of the Act was complained of in that case by certain natural persons who were residents and *citizens* of other States, and also by a foreign corporation, The Hull Coal and Coke Company, which was a corporation under the laws of the State of Virginia. The first contention of said parties was that the Act of 1877 violated Section 2 of Article 4 of the Constitution of the United States, which reads as follows: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Upon that contention this Court held in favor of the natural persons who were non-residents and *citizens* of other States than Tennessee, and that said Act did violate this provision of the Constitution. *Ibid., page* 254.

But as to The Hull Coal and Coke Company, the foreign corporation, the Court held that such corporation was not a "citizen" within the meaning of Section 2 of Article 4 of the Constitution, and as to it, said Act did not violate Section 2 of Article 4 of the Constitution. Said corporation then invoked the protection of Section 1 of the 14th Amendment of the Constitution, which provides that no State shall deprive *any person* of property without due process of law, and this Court held that said foreign corporation was a "person" within the meaning of the 14th Amendment. The Court further held that The Hull Coal and Coke Company was not *deprived* of any property because it was a simple contract creditor and had no property interest in the assets of the foreign corporation. *Ibid., pages* 259 *and* 260.

In the case at bar the Travelers' Insurance Company is a foreign corporation and is not a "citizen," so as to enable it to

invoke the protection of Section 2, Article 4, of the Constitution; so also, if it was a simple contract creditor it could not invoke Section 1 of the 14th Amendment of the Constitution, because it was not to be deprived of any *property* without due process of law. But the Travelers' Insurance Company occupies a different position from The Hull Coal and Coke Company, in this, that it is not a simple contract creditor, but is a creditor holding a mortgage on the property of the Land Company. This mortgage is *property*, and the Act of 1877, Chapter 31, deprives the Travelers' Insurance Company of this property without due process of law.

As before shown, Section 4 of the Act of 1877 expressly authorized said Land Company to "sell, lease and convey such real estate as natural persons may do." This included the right to mortgage its real estate.

On November 23rd, 1891, while said Land Company was a solvent and going concern, and while it had express authority and right to make said mortgage, it borrowed from the Travelers' Insurance Company $30,000.00 in cash, at the city of Hartford in the State of Connecticut (Printed Record, p. 147), and, to secure the same, executed said mortgage of November 23rd, 1891, on the Hotel property alone, leaving the balance of its property unincumbered. This balance so left unincumbered was more than sufficient to pay all the claims of resident Tennessee creditors, accruing prior to November 23rd, 1891, amounting to $29,377.36. *Stipulation, page* 144.

The total value of the Land Company's assets was $66,123.31. *Ibid, page* 145

Of this, the Hotel property furnished $25,000.00, leaving $41,123.31 with which to pay $29,377.36 to the resident Tennes-

see creditors, whose claims accrued prior to November 23rd, 1891.

The resident Tennessee creditors claim that, under Section 5 of said Act, they had a statutory lien on said property at the time said mortgage was made on November 23rd, 1891. Section 5 of the Act does not undertake to give the resident creditors a *lien* on the *property:* but only "a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts."

It is thus apparent from the terms of the Act itself that no lien was given to the resident creditors on the property of the Land Company: and whatever rights they have under the statute could not take effect until the time when a distribution of the assets in payment of debts should occur. The Hotel property was therefore clear of all lien on November 23rd, 1891, when the mortgage was made to the Travelers' Insurance Company.

The Supreme Court of Tennessee did not construe said Act to give a lien on the property of the Land Company at the time of the accrual of the resident creditors' debts, but construed the Act to mean that the valid mortgage lien of the Travelers' Insurance Company was displaced and lost by the subsequent and unforeseen accident of insolvency of the Land Company. In other words, the Court held that, under the 4th section of the Act, the Travelers' Insurance Company acquired a valid first mortgage lien on the Hotel property: and then, under the 5th section, this valid first mortgage lien was taken away by the accidental happening of an unforeseen contingency, not contracted for; and this was held to be due process of law.

This case must be distinguished from cases where a statute gives a lien to parties who have contributed to the betterment of

the "common pledge," such as the case of *Provident Institution vs. Jersey City*, 113 U. S., 506--516, where a lien for water rents was given: and the case of *Walston vs. Nevin*, 128 U. S., 578, where a lien was given for street assessments: and the case of *Norwood vs. Baker*, 172 U. S., 269--279, where it was held that an assessment for street improvement was not taking the owner's property without due process of law, provided the assessment did not exceed the benefits to the property; but if the assessment substantially exceeds the benefits, then, to the extent of such excess, it is taking the property without due process of law.

The Tennessee Act of 1877 is not limited to creditors whose claims accrued from benefits or betterments to the Land Company's property, but extends to all resident Tennessee creditors; and the effect of the Act is to take the property of the Travelers' Insurance Company and give it to other persons because they are residents of Tennessee, and not because they have benefitted the real estate on which the Insurance Company's mortgage rests.

In the case of *Norwood vs. Baker*, 172 U. S., 279, above referred to, it was held that an assessment for improvements in excess of benefits was, to the extent of the excess, a taking of the owner's property without due process. In the case at bar the whole assessment, so to speak, is in excess of the benefits, because the creditors to whom the State court gave the Insurance Company's property had conferred no benefits on the "common pledge," or on the public.

In *Missouri Pacific Railway vs. Nebraska*, 164 U. S., 403--417, the State Board of Transportation of Missouri made an order on the Railroad Company to allow private persons to build a grain elevator on its right of way, and claimed the authority to make this order under a statute of the State. The Supreme Court of

Missouri, in a mandamus proceeding brought to compel the Railroad Company to obey this order, held that the statute authorized the order. *Ibid*, p. 414.

It was held by this Court that this was taking the Railroad Company's property without due process of law.

A statute of Louisiana forbade any person to take out insurance on property in that State in any insurance company which had not complied with the laws of that State. Allgeyer insured cotton then in New Orleans in a New York company, which had not complied with the laws of Louisiana. The Supreme Court of Louisiana gave judgment for $3,000.00 against Allgeyer for the penalty of violating this statute. This Court held that this statute was not due process of law. *Allgeyer vs. Louisiana*, 165 U. S., 578--591.

It is not deemed necessary to enter into refinements upon the meaning of the words "due process of law," or to multiply authorities on the subject. In the cases cited, the whole question of due process of law has been fully considered, and the other cases on the question cited and commented upon.

We must come at last to the proposition, that the Act of 1877, as construed by the Supreme Court of Tennessee, takes from the Travelers' Insurance Company its property, lawfully acquired, and turns it over to a class of individuals, upon the accidental happening of an unforeseen contingency, solely because they are residents of Tennessee, and not because of any merit in their claims. It seems to be a plain case of depriving the Insurance Company of its property without due process of law.

II.

It may be claimed by adversary counsel that the Travelers' Insurance Company is not entitled in this Court to claim the

protection of Section 1 of the 14th Amendment to the Constitution, because it did not directly and distinctly rely upon and urge this point in the State Court.

In reply, we say:

1st. That the Supreme Court of Tennessee, in its decree of November 19th, 1898, distinctly adjudged that said Act of 1877 was not in contravention or violation of Section 1 of the 14th Amendment. *Printed Record*, p. 87. In *Kaukauna Co. vs. Green Bay, &c., Canal*, 142 U. S., 269, this Court held: that, although the inhibition of the Constitution was not distinctly put in issue by the pleadings, or directly passed upon in the opinion of the State Court, still this Court will consider the Constitutional question, if an adjudication of such was necessarily involved in the disposition of the case by the State Court.

The case at bar is stronger than that case, because the decree of the Supreme Court of Tennessee does show, as above indicated, that this question was directly and distinctly adjudicated by that Court.

2nd. Not only was this inhibition of Section 1 of the 14th Amendment passed upon by the Supreme Court of Tennessee, but it was also passed upon by the Court of Chancery Appeals. In its opinion, the Court of Chancery Appeals states that the Travelers' Insurance Company's assignments of error raise this question: (*Printed Record*, p. 65) and (on page 72) holds the Act of 1877 to be Constitutional, basing its opinion on former decisions of the Tennessee Supreme Court: and its decree adjudges this Act to be Constitutional. *Page 84*. It is true that the assignments of error of the Travelers' Insurance Company to the decree of the Chancery Court do, as printed in the Record (Page 92),

appear to rely alone on Section 2, Article 4 of the Constitution, and Section 1 of the 14th Amendment does not appear to be distinctly mentioned: but the opinion of the Court of Chancery Appeals shows that this section of the 14th Amendment was relied upon and the Court held against the Insurance Company's contention.

3rd. Moreover, Carhart & Sully claimed a lien on the Land Company's property under the mortgage of February 10th, 1893. They were non-resident "persons" claiming under a mortgage and were necessarily in the same class with the Insurance Company. Their assignments of error distinctly raised the questions of the Constitutionality of the Act of 1877, under Section 1 of the 14th Amendment. *Pages 123-4 and Page 86.*

The Insurance Company was before the Court of Chancery Appeals and the Supreme Court of Tennessee upon a broad appeal from a decree in Equity, which took up the whole case. *Page 52.*

If the Supreme Court of Tennessee had held the Act of 1877 Constitutional, upon the assignments of error of Carhart & Sully, this holding would, under the Tennessee practice, operate against the Insurance Company, and all other parties similarly situated, even if they had not assigned errors on that question.

Wood vs. Cooper, 2 Heiskell, 441.
Reynold's vs. Brandon, 3 " 598.
Carnes vs. Polk, 5 " 244.
Grubb vs. Browder, 11 " 299.
Parsons vs. Kinzer, 3 Lea, 352.
Butler vs. Kinzie, 6 Pickle, 32 & 383.

Under these decisions, the protection of Section 1 of the 14th Amendment having been claimed by Carhart & Sully, the Ten-

nessee Supreme Court would pass upon it for all parties similarly situated, including the Insurance Company. The claim of the Insurance Company was considered by said Supreme Court to be before it for adjudication and was passed upon accordingly.

This gives this Court jurisdiction.

Morrison vs. Watson, 154 U. S., 115.

4th. But this elaboration is unnecessary. There is no doubt about the fact that the Insurance Company was before the Court of Chancery Appeals and the Supreme Court upon a broad appeal and did claim the protection of Section 1 of the 14th Amendment: and both Courts denied the claim. The claim is now made again before this Court in the assignments of error appended to this brief.

T. S. WEBB, *Solicitor.*

H. H. CARR,
WEBB & McCLUNG,
Of Counsel.

APPENDIX.

IN THE SUPREME COURT OF TENNESSEE.

AMERICAN NATIONAL BANK ET AL

vs.

CARNEGIE LAND COMPANY ET AL,

AND

WILBERFORCE SULLY, TRUSTEE, ET AL

vs.

CARNEGIE LAND COMPANY ET AL.

CONSOLIDATED CAUSES.

ASSIGNMENTS OF ERROR.

The Travelers' Insurance Company, a private corporation, a resident of Connecticut, with its principal office in Hartford, by its Solicitors, feeling itself aggrevied by the findings and decree of the Supreme Court of Tennessee in the above entitled causes, assigns errors thereto, as follows:

I.

That the said Court erred in finding and holding that the Act passed by the General Assembly of Tennessee, on the 19th day of March, 1877, and approved on March 21, 1877, being Chapter 31 of the Laws of Tennessee of 1877, defining the terms upon which foreign corporations organized for mining and manufacturing purposes may carry on their business in Tennessee, and

especially Section 5 of said Act, was not in violation of Section 2, Article IV, of the Constitution of the United States, which provided that, "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States;" and said Court erred in holding thereunder that Tennessee creditors were preferred, by virtue of said void Act, over appellant, as a citizen and resident of another State, in the distribution of the assets of defendant Company; that said Court should have held that as to appellant, as a resident and citizen of the State of Connecticut, the Act in question gave an unauthorized preference, privilege and immunity to residents and citizens of the State of Tennessee, by virtue alone of said residence and citizenship, the Act and Section thereof was unconstitutional and in violation of said clause of the Constitution of the United States as against said appellant, in this:

1. Appellants being the beneficiary under a Deed of Trust duly executed and delivered on certain real estate therein described to secure to them the repayment of a loan of thirty thousand dollars ($30,000.00), the said Deed of Trust having been executed at a time when the Carnegie Land Company was solvent, and there existing no legal impediment to the execution of said Deed of Trust, and the real estate embraced therein belonging to said Carnegie Land Company, and being free from any legal demand or claim in favor of any creditor of said Carnegie Land Company, the Court should have decreed in favor of appellants' right to subject the real estate embraced in said Deed of Trust to the satisfaction of its said debts.

2. Because said Court refused to recognize and uphold appellants' rights under said Deed of Trust until after the satisfaction of the debts created prior thereto in favor of citizens and residents of the State of Tennessee, was an adjudication without

authority of law and in violation of Section 2, Article IV, of the Constitution of the United States.

3. Appellant, by virtue of its said Deed of Trust, was entitled to have subjected to the payment of its debt the proceeds of the real estate embraced therein without being postponed to the rights of the creditors of the Carnegie Land Company, either residents or non-residents of the State of Tennessee, and the denial of this right in favor of appellant by said Supreme Court was without authority of law and in violation of Section 2, Article IV, of the Constitution of the United States.

4. The said Act of 1877, Section 5, does not impose upon the beneficiaries under trust deeds who are citizens and residents of Tennessee any such postponement of their rights as is sought to be imposed upon beneficiaries under deeds of trust who are citizens and residents of other States than Tennessee; the postponement of such non-resident creditors under their deeds of trust, contracts and engagements, to the rights of creditors who are citizens and residents of the State of Tennessee, and whose debts were created prior to the execution and registration of said trust deeds and engagements, places a burden upon and withholds a benefit from such non-resident creditors that is not placed nor withheld from the class of Tennessee creditors.

II.

That in the Chancery Court held in Johnson City, Washington County, Tennessee, being the court which had and exercised the original jurisdiction in the above entitled causes, the appellant herein specifically set up and claimed that it was entitled to the privileges and immunities guaranteed in Section 2, Article IV, of the Constitution of the United States, viz: "The citizens of each

State shall be entitled to all the privileges and immunities of the citizens of the several States;" and that it was deprived of such privileges and immunities by the Act of Tennessee, approved March 21, 1877, above referred to; and, also that its rights, privileges and immunities as a citizen of the United States were abridged by the provisions of the statutes of the General Assembly of Tennessee, approved March 21, 1877, above referred to, under the provisions of Section 1, Article XIV, of the Amendments of the Constitution of the United States, and that it was also deprived of its property and rights without the process of law by the enforcement of said invalid Act of said General Assembly of Tennessee, but the decision of said Chancery Court was against said rights, privileges and immunities so claimed by appellant; and the same rights, privileges and immunities so set up and claimed by appellant in said Chancery Court were again set forth and claimed by said appellant in the Supreme Court of Tennessee, the highest court in the State of Tennessee in which a suit of this kind could be had, and the decision of said Supreme Court was against appellant.

All of which is here assigned as error.

III.

That the said Supreme Court of Tennessee erred in finding and holding that the said Act of the General Assembly of Tennessee, passed March 19, 1877, and approved March 21, 1877, and being Chapter 31 of the Acts of 1877, and especially Section 5 thereof, which was enforced against appellant in the above entitled causes, was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides as follows:

"No State shall make or enforce any law which shall abridge "the privileges or immunities of citizens of the United States;

"nor shall any State deprive any person of life, liberty or proper-
"ty, without due process of law; nor deny to any person within its jurisdiction "equal protection of its laws"; but said court should have held that said Act, and especially section 5 thereof, did abridge the rights and privileges of appellant as a citizen of the United States, and did deprive appellant, as mortgagee, of its property and rights, without due process of law, and deprived it of the equal protection of the laws, in this:

1. That said deed of trust was made by a solvent and going corporation, to-wit, the defendant Carnegie Land Company, authorized to make the same under the laws of Tennessee, and having the Constitutional right, as a solvent and going concern, to contract, as any other person or corporation within the State of Tennessee, which Constitutional right of the parties to said contract, to have the same enforced substantially as provided by the terms thereof, could not be taken away by statute, on the happening of a future event or winding up of the maker of said deed of trust, the Carnegie Land Company,—such arbitrary Statute destroying in this case, by its application, the ability and right of such a going concern to use and handle its property and contract with respect thereto as permitted to all other solvent holders and owners of such property within said State.

2. That said court should have held that said Act, and section 5 thereof, which was enforced against appellant, and through which Tennessee creditors were given priority over appellant in the distribution of the assets of Defendant Company, though claiming under a prior deed of trust, was in violation of said section 1 of Article XIV of the Constitution of the United States, and was not "due process of the law, because said Act, and section, was class legislation within the meaning of the law, in that the selection of the class subject to its provisions, to-wit, foreign

corporations permitted to do business as Tennessee corporations, in all respects, and whose engagements were by said Act to be enforced in the same manner as provided for natural persons, was not a natural but an arbitrary selection of class, without any reason, public or private, pointed out or to be otherwise seen, why these particular mining and manufacturing corporations more than any natural person or other domestic corporation, or other foreign corporation not organized for manufacturing or mining, as embraced in the Act, should be deprived of the Constitutional right of other solvent and going concerns, or persons, to own, use and contract with respect to their property within the State, as allowed to all other property owners, and why the creditors of such corporation should be required to take a deed of trust subject to the priority in favor of unknown debts and debtors theretofore contracted, in the event of subsequent insolvency, when creditors secured by deeds of trust of no natural person, domestic corporation, or other foreign corporation, except manufacturing and mining, are required to be so postponed and deprived of their ordinarily legally acquired rights. In enforcing said Act against appellant and not holding the same void, for the above reasons, and thereby depriving appellant of its property and rights, said Court erred.

3. The said Court erred in refusing to recognize appellant's right to share in the distribution of the assets of the Carnegie Land Company equally with corporations organized under the laws of Tennessee who were creditors of said Carnegie Land Company.

4. The Court erred in refusing to recognize appellant's right to share in the distribution of the assets of the Carnegie Land Company equally with corporations which were not organized under the laws of Tennessee, and which had not entered the State

under the provisions of the said Act of 1877, Chapter 31, of the laws of Tennessee, but were doing business in Tennessee under the general laws of Tennessee and under the laws of the United States, and whose debts were not secured by deeds of trust, mortgage or otherwise, and who were not entitled to priority over appellant, and in so holding said Supreme Court of Tennessee abridged the rights and privileges of appellant as a citizen of the United States.

5. If from any cause the Court found and so held that appellant's deed of trust was inoperative, unenforceable, and gave appellant no superior rights over the other creditors of the Carnegie Land Company, then said court should have held that the Act of 1877, Chapter 31, and especially Section 5 of said Act, was void, and that the appellant was entitled to share equally with all other creditors in the distribution of the assets of the Carnegie Land Company, which right to so share in the distribution of said assets was denied appellant on the ground that it was a non-resident of the State of Tennessee.

Wherefore, this appellant prays that this cause may be re-examined by the Supreme Court of the United States for writ of error for and on the errors assigned, and said findings and decree of the said Supreme Court of Tennessee may be reversed.

H. H. CARR,
WEBB & McCLUNG,
Solrs.

STIPULATION.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

UPON WRITS OF ERROR TO THE SUPREME COURT OF TENNESSEE.

WILBERFORCE SULLY ET. AL.
vs
AMERICAN NATIONAL BANK ET. AL.

WHEREAS, in the original stipulation of counsel as to record to be printed, pages 142-147 of printed record in the Supreme Court of the United States in the above cause, and under stipulation sixteenth thereof, on page 146, occurs this stipulation:

"16th. The assignments of error filed in the Supreme Court of Tennessee. Tr., vol. 6, pages 2025, 2038 and 2052, 2078." And,

WHEREAS, it was intended by this stipulation to have printed, especially, the assignments of error of appellant's filed in the Supreme Court of Tennessee from the decree and judgment of that Court to the United States; and,

WHEREAS, the pageing under said stipulation sixteenth calls for only the assignments of error filed in the Supreme Court of Tennessee, from the decree of the Court of Chancery Appeals of Tennessee, instead of the assignments of error above set out, by mistake of counsel.

Therefore, in order that the matter may be corrected without additional expense in the printing of the record, it is hereby agreed on the part of counsel representing parties in the above cause that the assignments of error filed by appellants on January 20th, 1899, and found at page 2110, 2116 and 2118, 2120 and 2121, 2126, of volume 6 of the record in the above cause, now filed in the Supreme Court of the United States, may be printed in the Briefs of counsel as provided by rule 21 of the Supreme Court of the United States, together with this stipulation, and when so printed, will be taken as a part of the record in the cause, and in full compliance with Rule 21 of the Supreme Court of the United States.

E. C. REEVES, Sol. for Creditors.

S. C. WILLIAMS, Sol. for Robert Burrow.

ISAAC HARR, Sol. for K.

DEADERICK & EPPS, Sol. for Am. Natt. Bank et. al.

E. J. BAXTER, Sol.

SAMUEL M. ARNELL, Sol.

THAD. A. COX, Sol. for Kirkpatrick, Williams & Bowman, by Jno. H. Bowman member of the firm.

HENRY HUDSON.

WEBB & McCLUNG, H. H. CARR, Sols. for Tavelers' Insurance Co.

SHIELDS & MOUNTCASTLE, Sols. for Carhart, Myton, Sully and others.

WILBERFORCE SULLY, TRUSTEE, ET AL., vs. THE AMERICAN NATIONAL BANK, ET AL.) UNITED STATES SUPREME COURT.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

BRIEF FOR APPELLANTS WILBERFORCE SULLY, in his own right as assignee of E. C. Manning, and A. B. CARHART, AND MRS. MYTON, WHO ARE GENERAL CREDITORS OF DEFENDANT CARNEGIE LAND COMPANY.

STATEMENT OF THE CASE.

I.

This writ of error is to review the decree of the Supreme Court of Tennessee pronounced in the cause of American National Bank et al. vs. Carnegie Land Company et al., sustaining the constitutionality of a Tennessee statute, passed March 19, 1877, and approved March 21, 1877, being Chapter 31 of Acts of 1877, and especially Section 5 thereof, which is in its important part, as follows:

"Sec. 5. Be it enacted that the corporations and the property of all corporations coming under the provisions of this Act, shall be liable for all the debts, liabilities, and

engagements of the said corporation, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition."

The caption of said act is "An Act to declare the terms on which foreign corporations organized for mining and manufacturing purposes may carry on their business, and purchase, hold and convey real and personal property in this State."

The first section of the Act provides:

"That corporations chartered or organized under the laws of other States or countries, for the purpose of mining ores or coals, or of quarrying stones or minerals, or transporting the same, or erecting, purchasing or carrying on works for the manufacture of metals, or of any articles made of or from metals, timber, cotton or wool, or of building dwelling houses for their workmen and others, or gas works, or water works, or other appliances designed for the promotion of

health, good order, or general utility, in connection with such mines, manufactories and dwelling houses, may become incorporated in this State, and may carry on in this State the business authorized by their respective charters, or the articles under which they are or may be organized, and may enjoy the rights and to do the things therein specified, upon the terms and conditions, and in the manner and under the limitations herein declared."

Section 2 is as follows:

"That each and every corporation created or organized under or by virtue of any government other than that of this State, of the character named in the first section of this Act, desiring to carry on its business in the State must first file in the office of the Secretary of State, a copy of its charter or articles of association, and must cause an abstract of the same to be recorded in the office of the Register of each county in which said corporation proposes to carry on its business or to acquire any lands."

Section 3 provides:

"That such corporations shall be deemed and taken to be corporations of this State, and shall be subject to the jurisdiction of the Courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this State."

Section 4 provides that:

"Such corporations may purchase, acquire and hold real estate in fee, or any other interest less than the fee, and personal property of every kind, as they may deem necessary or suitable for the carrying on of the business specified in their

said charters or articles of association, filed as aforesaid with the Secretary of State, and may sell, lease, and convey such real estate as natural persons may do. And the State of Tennessee does hereby release its right of escheat by virtue of the alien origin of such corporations, or the alienage or non-residence of the shareholders of such corporation, or any of them."

The defendants American National Bank et al., on the 27th day of November, 1893, filed a general creditors bill against the Carnegie Land Company, a foreign corporation organized under the laws of the State of Virginia, and having complied with the Statute of Tennessee above set out, and subject to the provisions of the same, if valid.

This bill was filed in the Chancery Court of Washington County, Tennessee, alleging insolvency, failure to meet its obligations, and the fact that it had made a general assignment of all its property in Tennessee, without recognizing in said assignment the preference given to resident Tennessee creditors by said Act of 1877, chapter 31; and, also, said bill sought the appointment of a receiver and the administration of the assets of said company as an insolvent corporation

See Orig. Bill, tr. pp. 1 et seq.

See stipulations, tr. p. 143.

The bill was sustained as a general creditors bill, and administration was had of the affairs of said Carnegie Land Company thereunder.

Stipulations, id. id.

On May 28, 1895, Wilberforce Sully, trustee, and A. B. Carhart, mortgagee and holder of issue of first mortgage bonds, filed also an original bill in the same court against

said Carnegie Land Company and others to foreclose a first mortgage to secure bonds made to Sully, trustee, which had been registered February 10, 1893. This was consolidated with the general creditors bill, and the two cases were heard and tried together.

Id. id.

This mortgage was made while the Carnegie Land Company was a solvent and going concern, and covered all the property, real and personal, of the Company, and was a first mortgage and lien upon all of said property, except upon the Carnegie Hotel, the Travelers Insurance Company having first mortgage upon the hotel, and that of Sully, trustee, on its face being subject to that of the Travelers' Insurance Company as to said Hotel.

Stipulations, tr. p. 145.

Publication was made requiring all persons claiming to be creditors of said corporation, to intervene in said cause and set up their claims, and creditors did come in, and all claims were adjudicated, and no question is made in this court as to amounts allowed any creditors in the Tennessee courts.

Stipulations, tr. pp. 143-145.

The controversy in this court is between resident and non-resident creditors, and between resident and mortgage creditors, as to priorities under said Act of 1877, chapter 31, in the distribution of the assets of the Carnegie Land Company, depending upon the constitutional questions made in and decided by the Supreme Court of Tennessee.

Id., 145.

The Supreme Court of Tennessee upheld said Act and Section 5 thereof, and gave priority to Tennessee, over non-

resident, creditors and citizens, whether said non-residents were general creditors or mortgagees.

Decree of Supreme Court of Tenn. m tr. p. 87.

Plaintiffs in error are general creditors of the Carnegie Land Company, except that A. B. Carhart is a general creditor to the amount of about $3,000.00, and also a mortgage creditor for over $100,000.00, and this brief now presents the rights only of the general creditors, appellant—to be followed by separate brief for A. B. Carhart, mortgagee.

Plaintiff in error A. B. Carhart is the only general creditor who specifically and in his own behalf raised the questions now involved in the lower courts and in the Supreme Court of Tennessee, there being a stipulation of counsel to the following effect, "14th. Page 19 of the printed assignments of error of Sully, trustee, and A. B. Carhart attached to and certified between pages 2078-2079, volume 6 of the transcript, referring to the unconstitutionality of the Act of 1877, chapter 31."

Tr. p. 146.

The said assignment of error on that point, from the Court of Chancery Appeals, made in the Supreme Court of Tennessee, is as follows: "Appellant further assigns as error in the decree of the Court of Chancery Appeals that they should have held that said Act of 1877, before referred to, violates the Constitution of the United States, especially in that section of the same which provides for priority of Tennessee creditors over foreign creditors and citizens in the distribution of assets of such foreign corporation doing business in this State. The sections of the Constitution violated are section 2 of Article IV of the Constitution of the United States, and the latter part of the same,

which is as follows: 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'

"And section 1 of Article XIV of the amendments to the Constitution of the United States, and the latter part of the same, which is as follows: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"This question has been determined adverse to the contention of appellant by this court in the case of Embreeville Land & Freehold Company, in an oral opinion, and the constitutional question in the same case is now pending before the Supreme Court of the United States, and will doubtless be decided prior to the hearing of this cause in this court. In case it is not passed on, we desire the court to pass upon this question in this cause, so that in the event the Supreme Court of the United States declares said provision of said Act unconstitutional appellant may take advantage of the same in the Supreme Court of the United States. For the reason that the question has been expressly determined by this court, we forbear to make any argument upon the same here."

Tr. p. 86.

It will be noticed that here A. B. Carhart makes the questions, decided adversely to him and all other creditors, by the Supreme Court of Tennessee, which are made here by assignment of error. This assignment was answered by the decree of that court as follows: "II. That said Act (refer-

ring to Act of 1877, chapter 31, of the General Assembly of Tennessee) or any part thereof is not in contravention or violation of the Constitution of the United States, Art. 4, Sec. 2, or of Art. 14, Sec. 1, of the amendments to said Constitution.

So that the questions here raised are clearly made by Appellant Carhart in the Supreme Court of Tennessee, and decided there.

The contention on the part of Sully and Mrs. Myton is that they and E. C. Manning, assignee, being general creditors in like class with Carhart, and all their rights to equal distribution depending on the constitutionality of the same Act, the defense was joint, and the raising of the question, and its decision by the Supreme Court, was, in a legal sense, the raising of the question by all general creditors like affected, which point will be discussed at its proper place

ASSIGNMENT OF ERRORS.

(Being the same as filed from the final decree of the Supreme Court of Tennessee, style of cause here omitted, and part of transcript filed in this court, and printed herewith according to stipulations of counsel set out and annexed to this brief.)

ALFRED B. CARHART, WILBERFORCE SULLY, AS ASSIGNEE OF THE CLAIMS OF E. C. MANNING AGAINST CARNEGIE LAND COMPANY, AND MRS. MARY P. MYTON, BY THEIR SOLICITORS, FEELING THEMSELVES AGGRIEVED BY THE FINDINGS AND DECREE OF THE SUPREME COURT OF TENNESSEE IN THE ABOVE ENTI-

TLED CAUSE. ASSIGN ERROR THERETO AS FOLLOWS:

I.

That the said court erred in finding that the Act passed by the General Assembly of Tennessee on March 19, 1877, and approved March 21, 1877, being chapter 31 of the Acts of 1877, of General Assembly of Tennessee, and especially section 5 thereof, was not in violation of section 2 Article IV of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States;" and, said court erred in giving preference and priority under said Act, the same being invalid for foregoing reasons, to residents and citizens of Tennessee over appellants, who were residents and citizens of States other than Tennessee, in the distribution of the assets of defendant corporation, on its becoming insolvent.

II.

Said court erred in holding that said act, and especially said section 5 of the same, was not a violation of section 1, Article XIV of the Amendments to the Constitution of the United States, which provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." The act, in this cause, by the enforcement of the same by said court as against appellants, and the barring of appellants themselves from participation in the distribution of the assets of defend-

ant company, until after full satisfaction of debts of residents and citizens of Tennessee, in its operation abridged the privileges and immunities of appellants as citizens and residents of the United States.

III.

That said court erred in not enforcing the rights of appellants to share in the like form and manner in the distribution of the assets of the defendant company with residents and citizens of the State of Tennessee; that, appellant A. B. Carhart, of the class and representation of all other general creditors, citizens and non-residents of Tennessee, and residents and citizens of the United States, raised the question herein made as to the violation by said act of 1877 enforced against appellants in the above cause by the Supreme Court of Tennessee, of section 2 Article IV of the Constitution of the United States, as set out before and in the Supreme Court of Tennessee, the highest court in the State of Tennessee in which a decision in this suit could be had, and claimed the rights, privileges and immunities guaranteed to appellants under said provision of the United States Constitution, and the decision of said Supreme Court of Tennessee was against the rights, privileges and immunities so claimed by appellants under said provisions of the Constitution of the United States.

All of which is here assigned as error.

BRIEF AND ARGUMENT.

The first assignment of error raises the question which we think conclusive of the controversy, so far as it lies between Tennessee creditors and creditors who are residents and citizens of other States.

If plaintiffs in error and E. C. Manning, from this record, are residents and citizens of State other than Tennessee, to-wit: of the State of New York; and if appellants have raised and had decided in the Supreme Court of Tennessee the federal question now presented, within the meaning of the law, then this case falls directly within the case of Blake vs. McClung, 172 U. S., 239, which holds the very identical act and section thereof now complained of, a violation of section 2 Article IV of the Constitution of the United States.

1. Our first insistence is that plaintiffs in error are citizens of a State other than Tennessee.

It is agreed in the stipulations of counsel that neither Wilberforce Sully, trustee, A. B. Carhart, Mary P. Myton, nor E. C. Manning, whose assignee Wilberforce Sully is, proved, or attempted by evidence to show in what jurisdictions they were citizens respectively.

Stipulations, tr. 147.

Neither did Blake or Rogers, in the Blake-McClung case before referred to, prove or attempt "by evidence to show in what jurisdictions they were citizens respectively," on that point this court saying, "The suggestion is made that as the statute refers only to residents, there is no occasion to consider whether it is repugnant to the provision of the National Constitution relating to citizens. We cannot accede to this view. The record shows that the litigation proceeded throughout on the theory that plaintiffs in error, Blake and the persons composing the firm of Rogers, Blake & Co., were citizens of Ohio, in which State they resided, transacted business and had their offices," etc. "The intervening petition of the plaintiffs in error, states that they were residents of Ohio, engaged in business in that State, their

residences, offices, and places of business being at the city of Cincinnati, and that they were citizens of the United States, and not citizens of Tennessee, although these allegations might not be sufficient to show that those parties were citizens of Ohio within the meaning of the Statute regulating the jurisdiction of the Circuit Courts of the United States (Robertson vs. Cease, 97 U. S., 646), they may be accepted as sufficient for that purpose in the present case, no question having been made in the State Court that the individual plantiffs in error were not citizens, but residents of Ohio."

So also in the case at bar it is admitted that the residences of the plaintiffs in error were in the State of New York, and "non-residents within the meaning of the Act in question," and all residents of Tennessee are set out.

Stipulations, tr. 144-147.

That the place of business of Sully and Carhart was New York City, appears inferentially in the original bill filed by them.

Tr. pp. 15-23.

In addition to this statement and the stipulation, it further is manifest that plaintiffs in error as well as all other parties, recognized that plaintiffs in error were citizens of a State other than Tennessee, and never questioned the fact, which the court can see was susceptible from this record, of the easiest affirmative proof, if unadmitted. The question of the violation of Article IV, Section 2, by the act in question, was made at an early stage of the cause by Sully and Carhart, was passed on in the Courts of Chancery Appeals and in the Supreme Court on the ground of the violation of

the rights of said Sully and Carhart as citizens of another State, by the enforcement of said act.

Assignments of Sully and Carhart, tr. p. 86.
Assignments of error in Court of Chancery Appeals, tr. p. 124.

No party to this record there denied, in answer to assignments of error, or otherwise, in argument, that the parties assigning were not citizens of another State and not entitled to raise the question. This is affirmatively shown by the decree of the Supreme Court of Tennessee, which meets the question fairly as one properly raised by a citizen of another State and decided on that, the only theory presented or relied on before them. In the assignments of error in the Supreme Court of Tennessee by Sully and Carhart, it is objected by them that said act of 1877, chapter 31, "which provides for priority of Tennessee creditors over foreign creditors and citizens in the distribution of assets of such foreign corporations doing business in this State, violates Section 2, Article IV (setting it out), and also Section 1, Article XIV of the amendments," etc., which was not answered by the Court's saying that the question was not raised by a proper party, i. e., a citizen of another State, but on the contrary treated the question as it has been treated all through the litigation, as one involving the rights of citizens of other states and decided it on its merits.

The general creditors bill in the cause below was filed by the American National Bank et al., who, by permission of the court, intervened in the Sully and Carhart bond case in behalf of themselves, as Tennessee creditors, and in behalf of all other bona fide creditors of the Carnagie Land Company.

These people acting for all others in their answer at the threshhold say, "Respondents will here show that even if said mortgage were valid, and said $85,000.00 of bonds were in fact issued, the debts sued on by the American National Bank and Shields Bros., were contracted by the Carnegie Land Company and owing long before the execution and registration of said mortgage, and that therefore these debts owing to citizens and residents of Tennessee prior to the execution and registration of said mortgage would have priority under the law over any debt secured or intended to be secured by said mortgage."

Answer of Am. Nat. Bank et al., tr. p. 30.

This answer was filed August 2, 1895, and then and thereafter, in this record, the words residents and citizens were used as meaning citizens under this statute. The parties and the court so treated it and we insist that it is now too late in this court to depart from it in order to side-track a plain constitutional right. Another and conclusive answer to such contention, if made, that plaintiffs in error are not citizens of another State than Tennessee, grows out of the plain language of the stipulations of counsel, i. e., "within the meaning of said act," and that their residence is in the State of New York.

Stipulations, tr. p. 144.

Now, what is a "non-resident creditor within the meaning of said act?" This was settled and well known to counsel, because the leading counsel of creditors opposing plaintiffs in error were of counsel in the case of Blake vs. McClung, wherein the court said, "Looking at the purpose and scope of the Tennessee statute, it is plain that the words 'residents of this State' refer to those whose residence in

Tennessee was such as indicated, that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention when absent from the State to return thereto; such residence as appertained to or inhered in citizenship. And the words in the same statute, 'residents of any other country or countries' refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents of some other State or country."

172 U. S., 247.

Now, if appellants were "non-residents within the meaning of the act" which meaning and construction had been given by this court, before this case, then plaintiffs in error being "non-residents within the meaning of the act" are admitted to be citizens of New York.

2. If appellant Carhart, as general creditor, is then a citizen of New York, as seems clear, and raised and had decided the federal question here involved, as is manifest, then his right to a reversal of the decree is undisputed; but it will be insisted that plaintiffs in error, Wilberforce Sully, as assignee of E. C. Manning, and Mrs. Myton, did not appear in the Supreme Court of Tennessee, and did not raise and have decided the federal question here made. As against this contention, we have two answers as to Wilberforce Sully as assignee: 1. That Wilberforce Sully, trustee, was in the Supreme Court; that he raised this question and had a decision, and having done so in one right, it does not change the person of the exceptant, and that within the meaning of the law Wilberforce Sully raised the federal question, was in court, and can maintain this writ of error. 2. That the status of Wilberforce Sully and also Mrs. Myton was that of A. B. Carhart, and that if the Supreme Court of Tennessee

had, on the appeal and writ of error of A. B. Carhart and Sully, trustee, declared the act of 1877, chapter 31, and section 5, unconstitutional, the decree would have been pronounced, under the practice of that court, not only in behalf of Carhart and Sully, trustee, but in behalf of all other creditors in like situation, whether before the court by appeal or not, and that in remanding the cause for distribution of the funds, all citizens of the United States not citizens of Tennessee would have shared the fruits of Carhart and Sully's action, and that therefore, within the meaning of the law, these other creditors were raising the federal question now made, through the person of their representative, by way of joint defense, and on an adverse decision, have the individual right to abide by that decision, or to now prosecute a write of error to this court.

So far as we are able to discover, this question has not been before this court in this form, and the decision as to the necessity of the raising of the federal question by plaintiffs in error, in the highest court of the State, have been only in cases where the plaintiff in error did or did not sufficiently, properly, or opportunely raise the question himself, and the question here presented did not arise.

4 Wall., 177-180;
11 Wall., 36-39;
92 U. S., 327;
125 U. S., 54;
137 U. S., 300;
150 U. S., 433;
163 U. S., 63;
154 U. S., 114.

It seems to have been settled inferentially by this court, that if according to the practice of the particular State, the

point is raised, and in such way as to necessarily call for a decision upon the point, and such a decision as would necessarily, according to practice of the State, inure to the benefit of other parties like or jointly interested, if favorable, then that the point is raised by such party, within the meaning of the federal law upon the subject, and writ of error by such party whose rights are thus determined, may be prosecuted to this court. As was said by this court in the case of Morrison vs. Watson, 154 U. S., 115: "In order to give this court jurisdiction of a writ of error, to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity, must have been specially set up or claimed at the proper time and in the proper way. If it were not claimed in the trial court, and therefore, by the law and practice of the State, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the State, it cannot be asserted in this court."

Thus it is held that even though the question be raised in the highest court of the State, yet if the practice of that court precludes the consideration of the question by such court, on account of the same not being raised in the trial court, a writ of error cannot be maintained. So, on the contrary, it would follow, it seems, that if according to the practice of the court in question, the question was raised specially, and called for a determination of rights directly affecting plaintiffs in error, Sully and Myton, and which, if decided favorably, would have been held by that court to include plaintiffs in error, and decided adversely was held to exclude them, then writ of error could be prosecuted and

maintained. As stated in such case by Mr. Guthrie, "The question thus often becomes one of the practice in the particular State."

Guthrie on Fourteenth Amendment, p. 156.

Then, under the practice in Tennessee, would the decision of the question now raised by plaintiffs in error in this court, and raised by them through A. B. Carhart in the Supreme Court of Tennessee, if decided favorably to Carhart by said court, have been in favor also of Sully, as assignee, and Mrs. Myton, and have been so declared by said court under its holdings?

It is the uniform holding in Tennessee that "A broad appeal by any one party from an entire Chancery Decree, where the matter is purely of equitable cognizance, carries up the whole case, so as to allow relief to be granted to those who do not appeal."

Note 4 to Sec. 4891 Shannon's Code of Tennessee, citing 2 Tenn. Chy., 574; 2 Heisk., 441-561; 3 Heisk., 598; 5 Heisk., 244.

The above cases support the text, and the case in 2 Heisk., 561, was one where only three defendants appealed, and yet relief was granted to all the defendants in the Supreme Court. So also was the holding in the case in 3 Heisk., 598.

The Travelers Insurance Company, and it seems, also, American National Bank, prayed broad appeals from the decrees of the Chancellor and Court of Chancery Appeals.

Tr. pp. 52 and 85.

"If a decree is severable or adjudges independent rights, it will remain in force as to those parties who do not appeal, and be vacated as to those who do appeal. On the other hand, where the proper decree will necessarily affect the parties who have not appealed, the Supreme Court, al-

though the appeal be taken by only one party, will determine the whole cause as it stood before any decree was rendered."

Note 6 to Sec. 4891, Shannon's Code of Tennessee, citing 3 Lea, 352.

The very language of Mr. Shannon applying to equity causes, is taken from the case in 3 Lea, 352, and approved in all subsequent cases, and it does not affect the question as to who appeals; and a broad appeal is not necessary, provided the appeal or writ of error calls for a decision upon the very question affecting the rights of the other parties.

See 3 Lea, 352; 11 Heisk., 299.

The same principle was announced by the same court as late as 6 Pickle, 32 and 383.

In the latter case, one heir only excepted to a Master's Report as to debts. The court said, "The decree was one confirming the settlement between the executors and the estate of Lewis Shanks, and confirming a Report of the indebtedness of the same to other creditors. A defense interposed to such Report goes necessarily to the whole decree, and results to the benefit of all, even though the others had failed originally to except, and were therefore in no situation to interpose defenses in an error proceeding. A defense interposed by one heir or devisee in an account such as this was, inures to the benefit of the estate, and its effect cannot be limited to the one so excepting."

We think these cases are conclusive as to the practice in Tennessee, and if a person not excepting to report of Master, which is confirmed, can by appeal from the decree have the benefit of an exception by another appellant, as decided in last case cited, then we think it clear that a writ of error can be likewise prosecuted to this court to maintain and

have made effective a defense, which if sustained in the Supreme Court of the State, would have necessarily, according to the practice of that State, inured to the benefit of plaintiffs in error, and that, for this reason, the right now set up was "specially set up and claimed" in the highest court of the State, according to the practice of said State. If this is so, then all the appellants, general creditors, citizens of New York, are entitled to a reversal of the decree of the Supreme Court of Tennessee under the case of Blake vs. McClung, 172 U. S., 237.

If the assignments of error are well taken, and even if the mortgage of A. B. Carhart is valid, and Section 5 of the Act of 1877, chapter 31, violates only Section 2, Article IV of the Constitution, and for that reason the Travelers Insurance Company, a foreign corporation, is entitled to no relief, it not being a citizen within the meaning of Section 2, Article IV, and if, for any reason, A. B. Carhart, under his second mortgage, has no priority in the distribution of the proceeds of the sale of the hotel property covered by Travelers Insurance Company's mortgage, then plaintiffs in error insist they are entitled equally with Tennessee creditors to share in the distribution of proceeds of said hotel property.

Shields Bros., one of the Tennessee creditors in the original bill below has conceded the contention of plaintiffs in error, since the decision of Blake vs. McClung, supra., and now makes such concession.

R. E. L. MOUNTCASTLE,
For Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

WILBERFORCE SULLY, TRUSTEE, ET AL., vs. AMERICAN NATIONAL BANK ET AL. | UNITED STATES SUPREME COURT. October Term, 1899.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

BRIEF OF A. B. CARHART, MORTGAGEE, AND WILBERFORCE SULLY, TRUSTEE, SETTING UP THEIR RIGHTS UNDER THEIR MORTGAGE MADE BY DEFENDANT CARNEGIE LAND COMPANY.

THE RIGHTS OF THE GENERAL CREDITORS PLAINTIFFS IN ERROR. ARE, OF COURSE, SUBORDINATED TO THE RIGHTS OF PLAINTIFF IN ERROR CARHART, MORTGAGEE, AS TO THE PROCEEDS OF THE PROPERTY COVERED BY THE LATTER'S MORTGAGE, IN THE EVENT THIS COURT IS OF OPINION THAT THE ACT OF 1877, CHAPTER 31, SECTION 5, IS INSUFFICIENT TO DIVEST THE LIEN OF THE SAME.

I.

STATEMENT OF THE CASE.

We here adopt the statement of the case made in the brief of plaintiffs in error, Sully, Carhart, and Mrs. Myton.

II.

ASSIGNMENT OF ERRORS.

(Being the same filed in the Supreme Court of Tennessee from the decree of said court, omitting style of cause, and transcribed in the record to this court, at pages indicated in stipulations, printed at the close of this brief.)

WILBERFORCE SULLY, TRUSTEE, AND ALFRED B. CARHART, RESIDENTS AND CITIZENS OF THE STATE OF NEW YORK, BY THEIR SOLICITORS, FEELING THEMSELVES AGGRIEVED BY THE FINDINGS AND DECREE OF THE SUPREME COURT OF TENNESSEE IN THE ABOVE ENTITLED CAUSE, ASSIGN ERRORS THERETO AS FOLLOWS:

I.

That the said court erred in finding and holding that the Act passed by the General Assembly of Tennessee on March 19, 1877, and approved on March 21, 1877, being chapter 31 of the laws of Tennessee of 1877, defining the terms upon which foreign corporations organized for mining and manufacturing purposes might do business in Tennessee, and especially section 5 thereof, was not in violation of section 2, of Article IV, of the Constitution of the United States which provides that, "The citizens of each state shall be entitled to all privileges and immunities of the citizens of the several States;" and said court erred in holding thereunder that Tennessee creditors were preferred by virtue of said void act, over appellants, as citizens and residents of other States, in the distribution of the assets of defendant Company; that, said court should have held that as appellants were residents and citizens of the State of New York, and as the act in question gave an unauthorized preference, privilege and im-

munity to residents and citizens of Tennessee, by virtue alone of said residence and citizenship, the act and section thereof was unconstitutional and in violation of said clause of the Constitution of the United States, as against appellants, in this:

a. Because, outside of their mortgage, appellants being the holders of the first registered mortgage upon most of the property of defendant company, and being the holder of the second mortgage to the Travelers Insurance Company, another appellant, upon the remainder of the property of the defendant company, appellants were at least entitled to share in all the assets of the defendants Carnegie Land Company, equally with residents and citizens of Tennessee.

b. By virtue of the mortgage above indicated held and declared by said court in favor of appellants, they, as citizens and residents of the State of New York, were entitled to the full security of their said mortgage upon all the property of the defendant company, both that covered by the first mortgage of appellants, and that covered by the second mortgage of appellants, as against all parties, Tennessee creditors, and all other citizens or corporations of other States, appellants taking the proceeds of the property upon which they hold the second mortgage, in the event the first mortgage, Travelers Insurance Company, for any reason, is not able to hold, by virtue of being a foreign corporation, and not a citizen within the meaning of the Constitution of the United States; the said Supreme Court of Tennessee should have thus held with respect to the rights of appellants under the mortgage, for the reason that said Act of 1877 and section 5 thereof does not impose upon the mortgagees, citizens, or residents of Tennessee any such postponement of their rights, as is sought to be imposed upon

mortgagees, residents, and citizens of other States than Tennessee, to-wit: the postponement of such non-resident mortgagees to the debts, contracts, and engagements of Tennessee resident creditors contracted prior to the making and registration of such valid mortgages, said act especially placing a burden upon and withholding a benefit from the non-resident mortgagee, that is not placed and withheld respectively in so far as Tennessee mortgagees are concerned; that if said act and section is valid as to the Travelers Insurance Company holding first mortgage upon part of the property, on account of the fact that the latter is not a citizen of another State than Tennessee, within the meaning of Section 2, Article IV of the Constitution, it nevertheless is true that said act is invalid as to appellants with reference to their lien upon not only the property upon which they hold their first mortgage, but also upon the particular property covered by the mortgage of the Travelers Insurance Company, as against all simple contract creditors—resident or non-resident creditors; and this the said court should have held, and their refusal to do so was manifest error.

2.

That in the Chancery Court held at Johnson City, in Washington County, Tennessee, being the court which had and exercised the original jurisdiction in the above entitled cause, the appellants herein specifically set up and claimed that they were entitled to the privileges and immunities guaranteed in Section 2, Article IV of the Constitution of the United States, viz.: "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States;" and that they were deprived of such privileges and immunities by the Act of Tennessee approved March 21, 1877, above referred to; and, also, that

their rights, privileges, and immunities, as citizens of the United States, were abridged by the provisions of the statutes of the General Assembly of Tennessee, approved March 21, 1877, above referred to, under the provisions of Section 1 of Article XIV of the Amendments of the Constitution of the United States, and that they were also deprived of their property and rights without due process of law by the enforcement of said invalid Act of said General Assembly of Tennessee but the decision of said Chancery Court was against said rights, privileges, and immunities so claimed by appellants; and, the same rights, privileges and immunities so set up and claimed by appellants in said Chancery Court were again set up and claimed by said appellants in the Supreme Court of Tennessee, the highest court in the State of Tennessee in which a suit of this kind could be had, and the decision of said Supreme Court was against appellants.

All of which is here assigned as error.

3.

That the said Supreme Court of Tennessee erred in finding and holding that the said Act of the General Assembly of Tennessee, passed March 19, 1877, and approved March 21, 1877, and being chapter 31 of the Acts of 1877, and especially Section 5 thereof, which was enforced against appellants in the above entitled cause was not in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" but

said court should have held that said Act, and especially Section 5 thereof, did abridge the rights and privileges of appellants as citizens of the United States, and did deprive appellants, as mortgagees, of their property and rights, without due process of law, and deprived them of the equal protection of the laws, in this:

a. That said mortgage was made by a solvent and going corporation, to-wit, the defendant Carnegie Land Company, authorized to make the same under the laws of Tennessee, and having the constitutional right as a solvent and going concern, to contract as any other person or corporation within the State of Tennessee, which constitutional right of the parties to said contract, to have the same enforced substantially as provided by the terms thereof, could not be taken away by statute, on the happening of a future event or winding up of the mortgagor, Carnegie Land Company —such arbitrary statute destroying, in this case, by its application, the ability and right of such a going concern to use and handle its property and contract with respect thereto, as permitted to all other solvent holders and owners of such property within said State;

b. That court should have held that said Act, and Section 5 thereof, which was enforced against appellants, and through which Tennessee creditors were given priority over appellants in the distribution of the assets of the defendant Company, though first mortgages, was in violation of said Section 1 of Article XIV of the Constitution of the United States, and was not "due process of the law," because said Act and section was class legislation within the meaning of the law, in that the selection of the class subject to its provisions, to-wit: Foreign corporations permitted to do business as Tennessee corporations, in all respects, and whose

engagements were by said Act to be enforced in the same manner as provided by law for natural persons, was not a natural but an arbitrary selection of class, without any reason, public or private, pointed out or to be otherwise seen, why this particular mining and manufacturing corporation, more than any natural person or other domestic corporation, or other foreign corporation not organized for the purpose of manufacturing or mining, as embraced in the Act, should be deprived of the Constitutional right of other solvent and going concerns, or persons, to own, use and contract with respect to their property within the State, as allowed to all other property owners, and why the creditors of such corporation should be required to take a mortgage subject to the priority in favor of unknown debts and debtors theretofore contracted, in the event of subsequent insolvency, when mortgagees of no natural person, domestic corporation, or other foreign corporation, except manufacturing and mining, are required to be so postponed and deprived of their ordinarily legally acquired rights. In enforcing the Act against appellants, and not holding the same void, for the above reasons, and depriving thereby appellants of their property and rights, said court erred.

Wherefore, these appellants pray that this cause may be re-examined by the Supreme Court of the United States for writ of error for and on the errors assigned, and said findings and decree of the said Supreme Court of Tennessee may be reversed.

III.

BRIEF AND ARGUMENT.

I.

It is unnecessary to again take up the argument as to the citizenship of Sully, trustee, and Carhart, mortgagee, and we refer to the argument advanced in the brief of plaintiffs

in error, Sully, Carhart, and Myton, upon the question of citizenship, but the question we desire to first discuss, arises under the first assignment of errors, and presents for the consideration of this court the question, whether Section 5 of Chapter 31, Act of 1877, before set out, grants to Tennessee citizens, who are mortgagees and judgment creditors any privilege or immunity over judgment creditors or mortgagees who may be residents and citizens of a State other than Tennessee.

This part of the Act and of Section 5, to be construed, is the following: "Nevertheless creditors who may be residents of this State, shall have a priority in the distribution of assets, or subjection of the same or any part thereof to the payment of debts, over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts, which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid and shall constitute a prior lien on the property on which they are or may be charged, as against all debts which may be incurred subsequent to the date of their registration or rendition."

It will doubtless be insisted by defendants in error that there is no burden placed upon non-resident citizens, mortgagees and judgment creditors, that is not placed upon resident mortgagees and judgment creditors. In other words, that Tennessee creditors who have no mortgage and no judgment, have priority over mortgagees and judgment creditors, if the debts of the former were contracted before the registration of the mortgage or the rendition of the

judgment, regardless of the residence or citizenship of the mortgagees or judgment creditors.

Stated differently, the proposition is, that a Tennessee creditor who has no judgment and no mortgage, shares with all other Tennessee creditors until the former takes judgment or mortgage, and by that act, he loses his right to share with Tennessee creditors, and instead of getting a benefit by his diligence, in case of subsequent insolvency, he not only loses the lien of his judgment or mortgage as to all debts contracted to Tennessee creditors before the registration or rendition, but in addition loses even that right that he formerly had as a general creditor. This looks remarkable on its face, and such construction must be imperative to justify the idea that the Legislature intended so unheard of, absurd, and unjust a proceeding. What possible reason can any one give for such an act, in the light of such construction? Is there anything in the remainder of the Act which leads to the conclusion that the Legislature intended here to say that a Tennessee creditor took a judgment, the ordinary process of law, against a foreign corporation owing him, only on the penalty of thereby taking, in the event of subsequent insolvency, subject to all Tennessee creditors, whose debts were contracted before his judgment was taken, although the other Tennessee debts may have been contracted years after the debt of the judgment creditor was contracted?

The whole act shows an intention to protect Tennessee creditors over foreign creditors, but no part of it shows any intention on the part of the Legislature to burden or punish one Tennessee creditor for the benefit of another. What public policy would justify such an unheard of proceeding, or what reason would support it? Why would the exercise

of ordinary process of law, allowed to all creditors for the collection of debt, visit upon the citizen of Tennessee, not the ordinary result, but the highest penalty, and a penalty which is higher than that visited upon the creditor who takes a judgment against a debtor corporation, already insolvent, no longer a going concern, and levies execution upon such corporation's goods, which penalty requires the creditor to lose only his apparent advantage, but yet permits him to share equally with all the other creditors.

No such proceeding is found anywhere else in Tennessee legislation, and it would prevent ordinary equality among Tennessee creditors, which is a cherished subject of such legislation, as evidenced by the general assignment law, and the law intended to prevent preferences by insolvent debtors

Act of 1881, chap. 121;

Act of 1895, chap. 128.

The latter act was so drastic in its efforts to enforce equality of distribution of the assets of all debtors, that the Supreme Court of Tennessee was forced to declare it unconstitutional, as violating the right of every solvent debtor to use and dispose of his property as he saw fit.

13 Pickle, 604.

In view of these stringent statutes to enforce equality among creditors, it would be strange if the Legislature, as is contended for on the other side, should swing completely to the other side without any reason, and say that a Tennessee judgment or mortgage creditor of a solvent concern, although universally in Tennessee, outside of this statute, in case of a judgment of a court of record, and of a mortgage registered, entitled to a recognized priority, is not even entitled to equality with other Tennessee creditors, if his

debtor happened to be a foreign corporation, doing business under the Act of 1877, chapter 31. What reason can be given for this arbitrary selection for punishment of Tennessee judgment creditors of a corporation, instead of likewise extending the punishment to such a creditor of an individual? Why not also to the judgment creditor of a domestic corporation? Why single out the Tennessee judgment creditor of only a foreign corporation organized for the purpose of manufacturing or mining?

If the construction of the language under review insisted on by defendants in error is correct, then the act violates the Tennessee constitution, and such a construction will be repelled by this court, if our view of it is correct, unless this court can find no other.

It is said by the Supreme Court of Tennessee in the case of Morris claimants vs. Stratton claimants, speaking through Ed Baxter, Special Judge, quoting the syllabus, "'Law of the Land,' correctly defined, means a law 'which embraces all persons who are or may come into like situation and circumstances.' It may be made to extend to all citizens, or be confined under proper limitations to particular classes. If the class be a proper one, it matters not how few the persons who may be included in it," and further, "Whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of this classification must be natural and not arbitrary. If the classification is made under Article XI, Section 8 of the Constitution for the purpose of conferring upon a class the benefit of some special right, privilege, immunity or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit.

If the classification is made under Article 1, Section 8 of the Constitution for the purpose of subjecting a class to the burden of some special disability, duty, or obligation, there must be some good and valid reason why that particular class should alone be subject to the burden."

5 Pickle, pp. 499-500.

Is there any "good and valid reason" why a Tennessee creditor of this particular kind of corporation, even if first debt created by such corporation, to promote its earliest enterprise and bring it into active being, should lose all rights of equality with other Tennessee creditors, by taking judgment or mortgage? If there should be conjured up some sort of reason, why would such reason not apply to such Tennessee creditor of other foreign corporation, domestic corporation, or even private person?

As the construction contended for by defendants in error would thus necessarily make the Act a violation of the Tennessee Constitution, as we insist, and as the construction we insist on is the one more natural and reasonable, and in consonance with the Tennessee Constitution, and the legislative purpose and policy, otherwise expressed, this court will give it the construction that the Legislature intended, i. e., to burden foreign citizens and residents who were mortgage or judgment creditors, with the priority of Tennessee creditors, contracted before, in the event of subsequent insolvency, and especially as all the Courts of Tennessee in the case at bar have practically and in effect so construed the Act, by decreeing that Tennessee judgment creditors should share equally and on the same basis as simple contract Tennessee creditors, when, if contention of defendants in error, now insisted on, had been insisted on by them in the State Courts,

and had been agreed to by the latter, Tennessee judgment creditors should have been postponed in favor of the debts of other Tennessee creditors contracted before the rendition of such judgments. Every Tennessee judgment creditor, on judgment rendered against Carnegie Land Company, was permitted to share equally with other Tennessee creditors.

H. C. Jarvis obtained a decree against Carnegie Land Company, Sept. 15, 1895, on debt contracted in 1890, and was allowed to share on a basis of equality with other Tennessee creditors, in the decrees of the Tennessee courts, notwithstanding the rendition of the decree.

Tr. Decree of Court of Chancery Appeals, p. 81.

It is one of the Tennessee creditors.

Stipulations, p. 143.

See also adjudications of Chancellor as to Tennessee creditors as a class, confirming Report of Master, tr. pp. 39-45-49.

Decree in above cause was rendered after general assignment of Carnegie Land Company.

In case of Frame King, a non-resident creditor was allowed to share as a Tennessee creditor, by virtue of right of Preas, a Tennessee creditor, who made payments as surety to King for his principal, the Land Company.

Decree of Supreme Court, p. 88.

This was by virtue of a decree rendered in favor of King, June 8, 1893, five days after the general assignment of defendant Land Company, June 3, 1893.

Decree of Court of Chancery Appeals, p. 82.

Maiden and wife, Sully assignee, was permitted to share with other Tennessee creditors.

Decree of Court of Chancery Appeals, p. 78.

This decree was rendered June 7, 1893, four days after the assignment, June 3, 1893. All these decrees were rendered before the general creditors bill of defendants in error was filed, Nov. 27, 1893, and before said bill was sustained for the distribution of the assets.

For the above reasons, we insist that the Act in question properly construed by this court, grants an immunity to Tennessee judgment and mortgage creditors, and imposes upon non-resident judgment and mortgage creditors, citizens of other States, the burden of submitting to a priority in favor of Tennessee creditors, whose debts were contracted before said mortgages were registered or judgments rendered.

This makes out a case clearly within the second section of Article IV of the Constitution of the United States, and mortgagees, citizens of other States, are entitled to priority, by virtue of their mortgages, to the same extent as would Tennessee mortgagees, the said mortgage of plaintiff in error having been made by a soivent concern, as agreed in the stipulations of counsel, and the Act in controversy having sought to deny this privilege to citizens not of this State, which is granted to residents of Tennessee, the said Act is void, and plaintiff in error should be decreed to be paid his debt, first out of the proceeds of the sale of the property covered by his mortgage, without abatement, except for the commission to be paid to the Clerk and Master for making sale of the property mortgaged.

This Act out of the way, plaintiff would take, under the

law of Tennessee, as above indicated, and under this Act, a mortgagee would likewise so take, and the measure of the Tennessee mortgagee's right is the measure of the right in all respects of plaintiffs in error. For status of Tennessee mortgagee

See 95 Tenn., 142-144.
91 Tenn., 12.
95 Tenn., 696.

If, for any reason, the mortgage of plaintiff would not hold the first lien, the mortgage debt, under the decision of Blake vs. McClung, supra, should share equally with Tennessee creditors, as stated in first assignment of error.

We furthermore insist, that, although the mortgage of Appellant Carhart is only the second mortgage on the particular piece of property, covered by the mortgage of the Travelers Insurance Company, to-wit: the Carnegie Hotel, yet the Travelers Insurance Company is not a citizen of the United States, within the meaning of the section of Article IV of the Constitution of the United States, and for that reason the Act in question is valid as to it.

Blake vs. McClung, supra.

This being the case, as a Tennessee mortgagee would by virtue of a second mortgage have priority in the distribution of the proceeds of sale of said Hotel property, so also plaintiff in error is entitled to like priority.

II.

We next insist that Section 5 of the said Act in controversy also violates Section 1 of the XIV Amendment to the Constitution of the United States, in this, that said Act seeks to deprive plaintiff in error of his property without due process of law.

The validity of said mortgage, and that it was made by a going concern, is admitted in the stipulations of counsel.

Tr., 145.

It has been said by this court, in the case of Blake vs. McClung, supra, "It does not follow that within the meaning of that Amendment" (meaning the XIV Amendment) "the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed."

172 U. S., 262.

It will be recalled that the claim of the Virginia corporation was only a claim of a general creditor, and no right of a mortgagee was involved in any wise in that case.

Can it be said that if a corporation has the right by law to contract a mortgage, fixing a lien upon property, and by law is deprived, in fact, as in this case, of that lien and debt, in favor of general creditors, of whom no notice is given to the mortgagee, by registration or otherwise, in consequence of an act happening after the making of the valid contract, through no act of the mortgagee, such a law is not depriving that mortgagee of his property, the lien of his note, which alone perhaps gives it important value?

If such an act produces the effect indicated, does it not, in fact, deprive the mortgagor and mortgagee of their liberty of contract, and of alienation of property, without due process of law?

These questions were specially set up and claimed in the

Supreme Court of Tennessee by plaintiff in error, and decided adversely to him.

Assignment of error of plaintiff in error, tr. 106; Decree of Supreme Court, tr. 87.

In addition to the foregoing points of objection, we insist that the said Act is not due process of law, because it is class legislation, and the selection of components of such class is entirely arbitrary, without any good, sound or plausible reason for same.

As to the first and second propositions, which may well be considered together, our insistence is that it is the right of every concern, going and solvent, authorized generally to do business in a State, and it is also the right of one proposing to deal with such concern, to contract, and in the enforcement of such right, to provide for a mortgage on the property of debtor, not subject to any future act or condition of such going concern, and that the right of such concern, legally doing business, to make such preference, cannot be legally prevented.

It is provided in Section 4 of the Act in controversy, that such corporation may acquire and hold real estate, and "may sell and convey such real estate as natural persons may do."

Here the corporation, admitted, on the performance of conditions precedent, has then, being admitted, the same constitutional rights as any natural person—and any fundamental or constitutional right cannot be taken away by any subsequent contingency happening after the admission of said corporation.

It has been decided in Tennessee that private corpora-

tions have the implied power to make mortgages without legislative authority, as is necessary in case of public corporations, such as railroads.

4 Pickle, 152.

We then insist that if the right to grant a preference, on the part of a solvent and going concern, to one of its creditors, is a fundamental right of property, and protected by the Constitution as such, then the right of a creditor to rely on same, cannot be taken away by a statute, under the guise of "terms" under which solvent and going concern shall do business in this State.

As quoted approvingly by the Court in the Blake-McClung case, from the case of Lafayette Insurance Company vs. French, 18 Howard, 404-407, "A corporation created in Indiana can do business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law, which secure the jurisdiction and authority of each State from encroachment by all others, or that principal of natural justice which forbids condemnation without opportunity for defense."

Blake vs. McClung, 172 U. S., 255.

In other words, a State may make reasonable regulations, but not by so doing deprive citizens or property owners of constitutional rights which they have as solvent owners of such property.

Is the right to make a preference to one creditor by mort-

gage, on the part of a solvent debtor, a constitutional right? The preference in this case was made by mortgage to plaintiff in error, by defendant Carnegie Land Company while a solvent and going concern, as is admitted. "The power of alienation of property is a necessity incident to the right of property, and was dictated by natural convenience and natural wants."

2 Kent's Com., 326,
Cooley's Con. Lim. (4th ed.), top page 493, Note 1, (6th ed.), 490.

"In America, the right to acquire, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance to our descendants in regular order and succession is enjoyed to the fullness and perfection of absolute right."

2 Kent's Com., pp. 327-328.

These quotations are approved in an able Tennessee opinion by Ed Baxter, Special Judge, in which it was decided that a statute preventing the transmission of property by a person non compos mentis, to his own descendants was unconstitutional, as not being due process of law or the law of the land.

The Stratton claimants vs. Morris claimants, 5 Pickle, 499.

It was also decided in a Tennessee case, in an opinion delivered by Chief Justice Snodgrass, that every solvent debtor had the constitutional right to dispose of his property in whole or in part, in good faith for the payment of his debts, and that meant the right to prefer.

13 Pickle, 610.

The court in the above case further says: "It is, and correctly, insisted that while this Act does not deprive him ab-

solutely of his property, it takes away from him that element of its value which consists in the right to use and legitimately dispose of it, and here it must not be forgotten that we are not dealing with the question of an insolvent debtor conveying its property or any part of it, or of a solvent debtor conveying his property, or any part of it, for the purpose of hindering, delaying or defrauding creditors."

Id., 610-611.

And, further: "To take from property its chief element of value, and to deny to the citizen the right to use and transfer it, in any proper and legitimate method, is as much depriving him of his property, as if the property itself were taken."

Id., p. 611.

The Divine Grocery Company, whose rights were involved in the above case, was a corporation.

The Act set aside in the above cause was "An Act to secure to creditors a pro rata distribution of the property, estates, and assets of debtors and to prevent debtors from making preferences among creditors by assignments, deeds of trust, mortgages, deeds, sales, pledges, or by any form of transfer or conveyance, or by confession of judgment," etc.

In-as-much as the Act in question prohibited a solvent debtor from making preferences in disposing of his property, it was held void.

The only ground manifestly upon which the Tennessee Supreme Court upheld the law in controversy in this case at bar, was that any conditions could be imposed upon the foreign corporation seeking admission into this State, because the same Act that violates the Tennessee Constitution as to the "law of the land," also violates the Fourteenth

Amendment to the Constitution of the United States as to "due process of law."

The general rule is thus stated by Mr. Cooley, "But there is no rule or principle known to our system, under which private property can be taken from one person and transferred to another for the private use and benefit of such other person, whether by general law or special enactment."

Cooley's Con. Lim., (6th ed.) p. 435.
***See also*, 127 U. S., 678-684;**
165 U. S., 590.

It will be noted, that in this case if the said Act is valid, the last estate of the mortgagor is worse than the first, after insolvency, over which he has no control.

Always, except under this statute, as shown by this court in case of Blake vs. McClung, 172 U. S., 254, in case of insolvency, all creditors who had not valid liens fixed, prior to insolvency, shared equally in distribution of assets after insolvency, but here, as never before, on insolvency, the mortgagee has not priority, as he has had up to that time, and has not equality, but goes from first to last—from having a first security, a property right of much value, he has no security in effect, and then takes his place at the foot of all, his property and security, under guise of law, sacrificed for the sole benefit of others. But it is said that he contracted with notice, and has no equity.

If the law be unconstitutional, notice of it is of no effect; but it is notice that does not notify. The Tennessee debts, contracted before the registration of the mortgage, are unknown in number and amount. They are not required to be registered. The debtor seeking additional credit on the faith of a mortgage, is not to be relied on to set out his indebted-

ness. It would simply be a leap in the dark. The mortgagee has no means of knowledge of the debts, and the insolvency which marks the end of his priority is beyond his control.

But it is said that this is analogous to lien laws and deposits of securities for certain creditors by Insurance Companies, which have been upheld. We submit, the cases are not at all analogous.

Liens, mechanic and otherwise, grow out of the work done or material actually furnished to which they attach. They are not floating equities as are the claims of Tennessee creditors in this case. They are not determined by future events, but go in with the property, and the acquisition of the property marks the beginning and the extent of the lien; but, in case of Tennessee creditors, their debts often have no relation to the property subsequently mortgaged.

The application of deposits in the State Treasury to the benefit of home creditors, in case of Life Insurance Companies, furnishes a further argument for our contention that a trust fund is applicable to the purpose for which it is designated and set apart, at a time when the Company setting it apart is solvent.

CLASS LEGISLATION.

We next insist that Section 5 of the Act of 1877, chapter 31, is not due process of law, because it is arbitrary classification of the most obvious character.

As has been said by distinguished authority, "If the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to

build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of Legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. 'To forbid to an individual, or a class, the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty, in particulars of primary importance to their 'pursuit of happiness,' and those who should claim a right to do so, ought to be able to show a specified authority therefor, instead of calling upon others to show how and when the authority is negatived."

Cooley Con. Lim., p. 484. (6th ed.)

This applies with exactness to the present case when only foreign corporations engaged in manufacturing and mining, the introduction of whose capital into the State the Legislature desired to facilitate, are shorn of a right granted to all other foreign corporations, domestic corporations and all natural persons, under the Constitution, laws, and decisions of Tennessee.

What reason can be given for the selection of this class, which is to be deprived of its right to contract, as others, and whose mortgage and judgment creditors, citizens of other States, shall lose the lien of their mortgages and judgments in favor of simple contract Tennessee creditors, first contracted, when, if there be a purpose, it would equally apply to all persons and corporations like situated?

As well stated by the Tennessee Supreme Court in the case of the Stratton Claimants vs. Morris Claimants, 5 Pickle, 535, "If the classification is made * * * * for the pur-

pose of subjecting a class to the burden of some special disability, duty or obligation, there must be some good and valid reason why that particular class should alone be subjected to the burden."

In other words, the selection must be a natural, not an arbitrary selection. These principles seem so well settled that there would seem to be no question but that the Act in question is class legislation, and, for that reason, not due process of law, under the holdings of this court.

129 U. S., 626; 118 U. S., 356-359; 165 U. S., 159; 139 U. S., 462-468.

In the last named case, this court, speaking through Justice Brewer, said: "In all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification." "No State can deprive particular persons, or classes of persons, of equal and impartial justice under the law. Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

As stated further by the Supreme Court of Kansas, following 139 U. S., 462-468, "A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital, and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character."

State vs. Haun, decided Dec. 9, 1899, and reported in Advance sheets, Part 5, vol. 11, Am. & Eng. Corp. Cases, (N. S.)

We insist that the Supreme Court of Tennessee predicated its decree adverse to plaintiff in error, not upon the ground that the rights here claimed are not constitutional rights of every citizen of the Union, with respect to property, but upon the dictum in the case of Fritts vs. Palmer, 132 U. S., 282, and on the general statement of the doctrine announced in the case of Pembina Con. Silver Mining and Milling Co. vs. Pennsylvania, 125 U. S., 181, that, "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits * * * * arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign."

And, we insist, on the contrary, that such legislation cannot admit such foreign corporations, on the performance of certain conditions precedent, and at the same time deprive such corperations and their creditors of rights of property secured to them by the Constitution of the United States in the Fourteenth Amendment, such rights as has every solvent creditor, by the law of the land. If this be not a proper limitation of the right of the State, they may admit with one hand and deny every substantial right with the other. In such an event, a foreign corporation, on entering a State under such a law, passes beyond the protection of the Fourteenth Amendment. Right of removal of causes to Federal courts in proper case is no more, we insist, a constitutional right, beyond the right of a State to impair by such legislation (170 U. S., 194), than is the right of corporations, when solvent, to dispose of their property, as all other persons and corporations are permitted to do.

In conclusion, we insist that plaintiff in error is entitled, under his second mortgage, to the fund realized from the

sale of the hotel property, as well as the proceeds of the property on which plaintiff in error has the first mortgage, for the reason that the Travelers Insurance Company did not, in the Supreme Court of Tennessee, "specially set up and claim" that the Act in controversy violated Section 1 of the Fourteenth Amendment to the Constitution of the United States, and cannot now set up the same, unless the raising and claiming of same by plaintiff in error would inure to the benefit of said Travelers Insurance Company.

See Assignment of Travelers Ins. Co. in Supt. Ct. of Tenn., tr. 89 et seq.

For all the above reasons, the Supreme Court of Tennessee should be reversed, and decree rendered for plaintiffs in error.

Shields Bros., one of the Tennessee creditors in the original bill below, has conceded the contention of plaintiffs in error, since the decision of Blake vs. McClung, supra, and now makes such concession.

R. E. L. MOUNTCASTLE,
For Plaintiffs in Error.

QUINCY WARD BOESE,
SHIELDS & MOUNTCASTLE,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

UPON WRITS OF ERROR TO THE SUPREME COURT OF TENNESSEE.

WILBERFORCE SULLY ET AL.
vs.
AMERICAN NATIONAL BANK ET AL.

WHEREAS, in the original stipulations of counsel as to record to be printed, pages 142-147 of printed record in the Supreme Court of the United States in the above cause, and under stipulation sixteenth thereof, on page 146, occurs this stipulation:

"16th. The assignments of error filed in the Supreme Court of Tennessee. Tr., vol. 6, pages 2025-2038 and 2052-2078." And,

WHEREAS, It was intended by this stipulation to have printed especially, the assignments of error of appellants filed in the Supreme Court of Tennessee from the decree and judgment of that court to the Supreme Court of the United States; and,

WHEREAS, The paging under said stipulation sixteenth calls for only the assignments of error filed in the Supreme Court of Tennessee from the decree of the Court of Chancery Appeals of Tennessee, instead of the assignments of error above set out, by mistake of counsel.

THEREFORE, In order that the matter may be corrected without additional expense in the printing of record, it is hereby agreed on the part of counsel representing parties in the above cause that the assignments of error filed by ap-

pellants on January 20, 1899, and found at pages 2110-2116, 2118-2120, and 2121-2126 of volume 6 of the record in the above cause, now filed in the Supreme Court of the United States, may be printed in the briefs of counsel as provided by Rule 21 of the Supreme Court of the United States, together with this stipulation, and, when so printed, will be taken as a part of the record in the cause, and in full compliance with Rule 21 of the Supreme Court of the United States.

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ROBT. BURROW.
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DEADERICK & EPPS,
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For Carhart, Myton, Sully, and others.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 266.

WILBERFORCE SULLY, TRUSTEE, ET AL., PLAINTIFFS IN ERROR,

vs.

THE AMERICAN NATIONAL BANK ET AL.

REPLY BRIEF OF PLAINTIFFS IN ERROR, WILBERFORCE SULLY, MRS. MARY P. MYTON, AND ALFRED B. CARHART.

R. E. L. MOUNTCASTLE,
Attorney for Plaintiffs in Error.

QUINCY WARD BOESE,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-25-1900

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REPLY BRIEF OF PLAINTIFFS IN ERROR, WILBERFORCE SULLY, MRS. MARY P. MYTON, AND ALFRED B. CARHART, TO THE BRIEFS AND ARGUMENTS MADE BY DEFENDANTS IN ERROR.

It is insisted in the brief filed by defendants in error, represented by S. C. Williams, that neither A. B. Carhart, Wilberforce Sully, nor Mrs. Mary P. Myton are citizens of other States than Tennessee. In addition to the argument made upon this question in our original brief, we desire to submit the following considerations:

I.

A. Such citizenship, to wit, "non-residents within the meaning of the act of 1877," as construed by this court in

the case of Blake *vs.* McClung, 172 U. S., is admitted in the stipulation, as before shown. It is no answer to this admission, which is well known to counsel, that the meaning of non-resident, as defined by the act of 1877, was given in the case referred to, as the same counsel were in it as are on briefs filed for defendants in error, and were familiar with that definition, and agreed to that stipulation, as a matter of fact, in order to save going through the record for the purpose of showing all the facts as to citizenship. It is too late now for them to be heard to question the fact admitted in the stipulation.

B. As showing how counsel on both sides regarded residence and citizenship, and how the same were treated from the beginning to the end of this record as identically the same as that held by the court and in the brief of counsel for general creditors in this cause, said brief being filed by Solicitor E. J. Baxter, and there being upon said brief Deaderick & Epps, the counsel who, with E. J. Baxter, filed the original general creditors' bill in this cause, and who are the representatives of general creditors, we quote from brief here filed by counsel for general creditors on page 7 as follows:

"They (referring to plaintiffs in error) are citizens of the State of New York, contracting under the laws of New York, and with the view of having the debt paid at the office of the company in New York."

No point is made in this brief, filed for general creditors *in solido*, that plaintiffs in error or E. C. Manning are not citizens of the State of New York, as agreed in the stipulations.

C. It is further contended by counsel for "certain defendants in error," represented by counsel, S. C. Williams, that they cannot be precluded by their failure to introduce proof

in trial court to negative citizenship of Carhart, Sully, and others for the reason that no question was made in the court below which would call for the relevancy of such proof. This is only a manifest error of said counsel, although nothing is shown as to that in the stipulated record except the use by counsel of the terms "citizenship" and "residence" as meaning the same thing as referred to in our original brief, but as counsel herein for defendants in error has stated that the point was not made in the lower court, we respectfully refer the court to page 1853 of volume 6 of the transcript, which shows that the question as to the violation of the Federal Constitution was made in chancery court in exceptions to the report of the master allowing priority to Tennessee claims, so that if counsel desired then to contest the question of citizenship, as averred and understood between all counsel in the case, as shown in our original brief, opportunity was given and declined.

II.

As to Residence and Citizenship of E. C. Manning, Assignor of Wilberforce Sully.

It is insisted by counsel for "certain defendants in error" that there is no averment or proof of the residence of E. C. Manning. We admit that in the stipulated record no proof nor averments in the general transcript are called for, but it was certainly understood and agreed to in the stipulations, page 177, printed Record, as follows:

"It is further stipulated that neither Wilberforce Sully, trustee; A. B. Carhart, Mrs. Mary P. Myton, nor E. C. Manning proved nor attempted by any evidence to show in what jurisdiction they were citizens respectively. *Each of them* did prove their respective residences to be as indicated above."

Now, the words "indicated above" mean that there are somewhere in the stipulations the residences of these parties set out. On page 144 of the stipulations their residences are set out as New York, except that it says, "Wilberforce Sully, assignee of E. C. Manning, New York."

Inasmuch as the stipulations first call to the attention of the court the fact that the residence of E. C. Manning was shown in the statement, we take it to be conclusive that such residence of E. C. Manning, within the meaning of the act of 1877, as called for in the stipulations, page 144, was New York. But counsel insists that the record not stipulated for shows that E. C. Manning was a resident of the District of Columbia, and that such residence gives no constitutional rights to such party within the meaning of section 2, article IV. If the court went into the original record—which we understand that it has the right to do, but with no obligation resting upon this court so to do—and such is the fact as to the residence of such party—then we insist that under section 2, article IV, such resident is a citizen of another State within the meaning of said constitutional provision, and to protect such a constitutional right of equal privileges and immunities under the laws of the United States the word "State" should be construed to mean all of the States and Territories of the United States. Each party is equally a citizen of the U.S. within the meaning of Clause 1 Sec. 1. XIV amendment. III.

It is also insisted by counsel for "certain defendants in error" that each of these debts due to the general creditors—Sully, as assignee of Manning; Mrs. Myton, and A. B. Carhart—are not shown in the record to have been contracted prior to the registration of the mortgages. This is true as to the stipulated record, but said debts had been contracted before, as shown in the transcript, and no stipulation in regard to it was made, because so well known to counsel, and no point on the same was made in the brief for general cred-

itors, defendants in error. It is true that in the petition of Mrs. Myton and Carhart setting up their unsecured claims in the chancery court at Johnson City, Tennessee, they set out the date of the note which they held. This note, however, was given in renewal of other indebtedness due from the Carnegie Land Company to said parties which had been taken up, but the date of contraction of the original debts is shown in the transcript as follows, antedating said mortgage registration by four months:

As to Mrs. Myton, Original Transcript, pp. 777 and 780, vol. 3.

As to A. B. Carhart, Original Transcript, p. 779, vol. 3.

Note filed with petition of Carhart and Myton was a renewal of note dated October 26, 1892, as reported by master and unexcepted to.

Original Record, vol. 3, p. 926.

The Manning debt is also shown to have been created before the registration of both of the said mortgages, to wit, on the 22d of March, 1890.

Report of master, Original Transcript, p. 925, vol. 3.

As to Mortgagee A. B. Carhart.

In answer to the proposition advanced in our original brief that plaintiffs in error, Carhart and Sully, trustee, have been deprived of immunities given to residents and citizens of Tennessee under article 2, section IV, of the Constitution of the United States, defendants in error insisted that the act of 1877, chapter 31, does not give to Tennessee mortgagees any immunities not granted to plaintiffs in error, and it is their argument that under said act of 1877 Tennessee creditors have to submit to a priority in favor of all debts contracted to Tennesseeans prior to the date of the

registration of said mortgage or taking of any judgment in favor of such Tennesseeans upon several grounds:

1. It is insisted at page 19 that their construction, which would subject all mortgagees alike, would be more consonant with justice. That argument comes with poor grace, when, if it be true, it would follow that justice would treat alike all resident as well as non-resident citizens, which manifestly was not the view taken by the legislature. If the legislature, therefore, had the idea to make a discrimination in favor of residents of Tennessee as against non-residents and citizens of other States, as they unquestionably did do, why did they not also make and intend to make this discrimination in favor of resident mortgagees as against non-resident mortgagees, which they likewise did, as we insist?

2. The next point contended for is that our construction of said act would make the statute work absurd results, for the reason it is said that the bonds issued upon the mortgage would go out upon the market, and the rights of any holder of said bonds would depend upon the fact as to whether the original purchaser of such bonds was or was not a resident of Tennessee.

This argument is in like position with the other, the act itself making that very inconvenience with respect to all other debts as well as to bonds secured by mortgages or debts secured by judgment. In other words, as to a note issued by said corporation payable to bearer, if presented for payment in the state of such corporation thereafter, the holder of said note, a simple contract debt before being entitled to the status of a Tennessee creditor, would have to prove that the first owner of said paper was a resident of the State of Tennessee, so that this argument of defendants in error comes to nought under the plain language of said act, it being as easy to locate and prove the first holder of bond as of such a note.

3. The third ground insisted on is that there are counter acts of Tennessee which may be looked to in aid of the construction as follows: The act of 1873, by which railroad mortgages, regardless of whether made to Tennesseeans or others, were subordinated to debts antedating and postdating such mortgages, and also the act of 1877, providing that claims for materials furnished and damages done in the operation of the road should have priority over any mortgage issued by such railroad company.

In answer to this we insist that such acts, instead of being an argument for the construction contended for by the defendants in error, are very much in favor of the construction contended for by plaintiffs in error, in this, that the acts of 1873 and 1877 referred to make no distinction whatever between claims of residents of Tennessee and residents of other States or citizens of Tennessee and other States as to priority over mortgage, but in giving a preference over the mortgage the preference is given alike to the claims, having no reference whatever to the residence or citizenship of the claimants. It would therefore make no difference, as no such purpose is manifest in the act to give a preference to Tennesseeans over others, that any construction could be called for making any distinction between the persons who hold the mortgage. In said case the purpose manifestly is to protect the claim regardless of residence or citizenship, while in the act at bar the intention is to protect creditors of Tennessee and not the character of the claim, and the character of the claim has nothing whatever to do with the question. The purposes of the two acts essentially differ—one always discriminating, the other never.

4. The next objection urged is that this court will adopt such construction of said statute as will uphold it as constitutional.

This is true, but where the construction insisted on by counsel makes the act evidently in violation of the constitu-

tion of Tennessee, as shown by the decisions of Tennessee, then the object of this court is to so construe said act as to make it, first, in harmony with the constitution of Tennessee, that being more obviously within the scope and in the mind of the persons passing the act. This court will not grant a construction to make it violate the Constitution of the United States, but in looking at the act, when they find out that the construction insisted on by the other side would certainly make it in violation of the constitution of Tennessee, they will give it a construction which will make it harmonious with the constitution of Tennessee, even if the effect of it is to preserve the rights of the plaintiffs in error in consequence of said act violating the Constitution of the United States.

5. Counsel for "certain defendants in error" next insist that this statute was construed by the State courts to grant the prior lien of the mortgage or judgment against all debts which may have been incurred subsequent thereto, and to deny such priority of lien only (not the debt in its original status) to their mortgages or judgments as respects antecedent debts. This contention of defendants in error works a plain absurdity, and the State courts made no such construction nor determination, and the illustrations given of such application are entirely misstated by counsel. Such contention was not made at the bar in fact, nor does it appear at any step of the proceedings of this case—stipulated record or transcript—and such was not the construction of said act by the court nor by any of the counsel in this case, nor was it insisted on, as is shown by the stipulated record. Such an absurd contention is negatived by the plain language of the statute itself. The language of the act is that "creditors who may be residents of this State shall have a *priority* in the distribution of assets," etc., "to the payment of debts over all simple contract creditors, being residents of any other country or

countries, and also over mortgage or judgment creditors for all debts, engagements and contracts which were made or owing by said corporations previous to the filing," etc. If counsel's contention is correct, the debts due to residents of Tennessee would not have a priority over mortgage creditors, but would simply share with mortgage creditors in the event such mortgage creditors' debts antedated the mortgages taken to secure the same. And in such event the act would read, that creditors who may be residents of this State, etc., should have an equal right to distribution with any mortgage or judgment creditors as to debts contracted before registration of such mortgage, not a "priority" over such mortgage creditor, but the act is otherwise expressly. Again, such a construction would lead to the most fraudulent results if it should be placed upon said act by this court or the courts of Tennessee, and must therefore not be presumed, because if a creditor who takes a mortgage has still the right to share equally with those creditors whose debts antedated his mortgage or judgment, or the judgment taken by him, if his debt antedates his mortgage, as is nearly always the case, every creditor would immediately, as soon as his debt was contracted, either take a mortgage or a judgment, for even if his mortgage or judgment were not valid, by taking it, he would make a class of Tennessee creditors, created before the date of his judgment, in which he would share, and the sooner his judgment was taken the more limited would be the number of such creditors sharing with him.

If this construction had been made by the courts of Tennessee, there would be a number of different classifications not made in said decree:

1. There would be a class who took prior to the registration of the first mortgage.

2. There would be a class who took prior to the registration of the second mortgage.

3. There would be a class between the second mortgage and the first judgment taken, even though such judgment were in favor of a Tennessee creditor; but, as a matter of fact, there only being mortgages in favor of non-resident citizens, the classification was simply made with reference to the mortgages, and no classification was made with respect to the judgments whatever, and nowhere in any of the decrees of the court of chancery appeals or the supreme court has the question as to the time of maturity of the mortgage debts or judgment debts cut any figure or been referred to except in the case of Jarvis, King, and Maden and wife, which present entirely different questions, and will be referred to hereafter.

By reference to the first decree pronounced in the chancery court at Johnson City, Tennessee, it will be seen that the chancellor made the following classes of claims:

1. After the payment of costs, taxes, &c., should be paid "all debts contracted prior to November 23, 1891, and due residents of Tennessee," November 23, 1891, being the date of the registration of the mortgage of the Travelers' Insurance Company on the hotel property, a part of the property of the Carnegie Land Company.

2. "All debts due residents of Tennessee contracted after November 23, 1891, and before February 10, 1893," the latter date being the date of the Carhart mortgage.

3. "Creditors, residents of Tennessee, whose debts were contracted after February 10, 1893," this last class taking without reference to judgments or otherwise, for the reason that, as will be more fully shown, the judgments being in favor of Tennessee creditors, the court either construing said act not to give a preference over such judgments, or else the judgment being taken after the Carnegie Land Company made a general assignment, and after its property

had become a trust fund for creditors, the judgment was of no effect as to creditors of said company or any one else.

4. "Non-residents of Tennessee by simply contract." (Printed Record, Tr., p. 45.)

This decree fixing this classification was not modified by any subsequent decree by the court of chancery appeals or the supreme court of Tennessee.

It will be noted further that no such claim as is made by counsel for "certain defendants in error" is made by counsel for general creditors in this cause. It will now be noted that the judgment in favor of H. C. Jarvis was taken on September 15, 1895. If this judgment in favor of this Tennessee creditor (the other two judgments in favor of King and Maden having likewise been taken after the general assignment was made by the Carnegie Land Company) had the effect the same as the taking of the mortgage in favor of Carhart or the Travelers' Insurance Company, there would have been a decree allowing all creditors whose debts were contracted between the date of the Carhart mortgage, February 10, 1893, and September 15, 1895, the date of the Jarvis judgment, to be paid ahead of any other debts to resident Tennesseeans, after the date of said Jarvis' judgment, and so likewise as to the judgments in favor of King and in favor of Maden and wife. As to the date of the Jarvis judgment, see printed Record, page 80.

This contention of counsel for "certain defendants in error" is made for the sole reason that it is known that the mortgage bonds of Carhart were taken, of course, after the mortgage was registered, although it might have the effect to put Carhart's indebtedness previously contracted in the same class as Tennessee creditors whose debts were contracted previous to that time, which, however, would be in the face of the plain language of said act, but it is insisted by counsel for "certain defendants in error," though not so

insisted by counsel for the general Tennessee creditors, that the court below actually construed said act as claimed by said counsel in the case of H. C. Jarvis, a Tennessee creditor who recovered judgment, as before stated, in 1895, and the quotation is made from the decree of the court of chancery appeals, which, without its context and without knowing the point which was under discussion by the court at the time, would give color to such contention; but when the decree of the court is read as to said claim and the point which was made against said claim is understood, it is manifest that the court was simply passing upon the assignment of error which had been made affecting the priority of said claim as being prior in right to the mortgage of the Travelers' Insurance Company. There is only one assignment of error attacking the decree of the chancellor allowing Jarvis' priority as a Tennessee creditor over the mortgage of the Travelers' Insurance Company, and that was the assignment made by the Travelers' Insurance Company itself.

Transcript, pp. 97, 98.

The Travelers' Insurance Company insisted that the Jarvis claim was not a debt against the Carnegie Land Company at the time the mortgage to the Travelers' Insurance Company was executed, because Jarvis in his cross-bill had only sued, it insisted, for five hundred and seventy-five dollars ($575), and yet a decree was granted him for $2,236.50; that an appeal had been prayed to the supreme court of Tennessee by the Carnegie Land Company, and afterward the appeal was dismissed and an agreed decree entered in favor of Jarvis for the sum of $1,800. It was insisted by the Travelers' Insurance Company that decree, at most, for $1,800 could only be good between Jarvis and the Carnegie Land Company, it being entered September 15, 1895; that the Travelers' Insurance Company was not joined in that case, and therefore could

not be bound. It was further insisted that the Travelers' Insurance Company had more than two years before made a general assignment, and all its affairs were then being wound up under a general creditors' proceeding. It will be borne in mind that it was not insisted that the act did not give Jarvis a right to his claim prior to the Travelers' Insurance Company, provided his debt was created before the time the mortgage was registered, but that the debt then was only $575, and yet the decree was thereafter rendered for $1,800, and was entered after the general assignment of the company, and it was claimed by the Travelers' Insurance Company that the decree was inoperative in fixing the amount at $1,800. In answer to this contention, the court of chancery appeals said that Jarvis purchased lots from the Carnegie Land Company in 1890, which was before the mortgage to the Travelers' Insurance Company; that at that time his right of action accrued on account of the fraud practised against him, which right of action culminated in the judgment for $1,800 after the property of Carnegie Land Company had become a trust fund for its creditors. The court of appeals say it was argued before them that in his cross-bill he only claimed $575. In this connection the court say that the real difficulty is over the contention whether the debt should be treated as of the date of his decree or as of the date of his right to recover. In other words, whether the debt should be for $575 or for $1,800. It was not insisted then by the Travelers' Insurance Company in their assignment of error, nor by the court, that his judgment taken after the general assignment had any effect whatever upon the proceedings; but, on the contrary, the court construed it as simply a question as to what was the amount of the debt, whether the debt fixed by the decree was the true original debt and as such entitled to priority over the Travelers' Insurance Company.

The contention now made by the defendants in error was not made by the Travelers' Insurance Company nor passed

on by the court. As to the case of Frame King, it stands upon exactly the same basis, and on similar exceptions taken thereto the chancellor decided against the King and Maden and wife claims due Tennessee creditors, on the ground that "the rights of the parties were founded on obligations made and entered into after insolvency." The question was whether the claims were created prior to the making of the Travelers' Insurance Company and Carhart mortgages or were the claims created after that. The judgments taken were not factors in either case, they being clearly taken after insolvency.

Dec. of chan., Pr. Rec., p. 44.

This whole matter is treated fully in the decree of the court of chancery appeals.

Pr. Rec., pp. 81, 82, 83.

The court there say that Preas' exceptions to the decree of the chancellor were well taken, on the ground that the Preas debt was created on December 11, 1891, before the registration of either of the mortgages, and that these transactions were all prior to the assignment of June 3, 1893, by the Carnegie Land Company, and that there was no debt created after those mortgages in favor of Preas and King, but that it was the same debt upon which the original liability was based. The fact that judgment was taken after insolvency and that there was a suretyship entered into after the insolvency is expressly here stated by the court to be immaterial.

Pr. Rec., pp. 82, 83.

The same state of facts also exists as to the claims or judgments in favor of Maden and wife. The exceptions made by the Travelers' Insurance Company alone to the report of the master allowing this as a claim as a Tennessee creditor were twofold:

1. That as the land on which Maden and wife claim their lien had been bid in by them at a price which satisfied their claim, they had no claim.

2. That the debt was created after the insolvency of the company, and therefore that the claim was founded upon an obligation entered into after insolvency.

Upon these contentions the court of chancery appeals passed in practically the same way as on the judgments in favor of Preas, King, and Jarvis.

It is also insisted in said brief of counsel for "certain defendants in error" that the construction of this statute contended for by defendants in error would grant to the residents of Tennessee who have reduced to judgment a demand of a foreign corporation contracted with Carnegie Land Company priority over residents of Tennessee. We insist that it would have no such effect, but that it would have the opposite effect, for the reason that a demand of a foreign corporation contracted with a corporation doing business in Tennessee and transferred to a resident of Tennessee would not give priority to such resident of Tennessee, because such resident of Tennessee would take the status of the Virginia corporation, which, under the act of 1877, has no priority whatever. The claim of the Carnegie Iron Company, assigned to A. R. Wing, has no bearing on the question, for the reason that this assignment to A. R. Wing was made after the Carnegie Land Company became insolvent, and Wing, as assignee, was denied a preference for the sole reason that, as assignee, he stood in the shoes of the foreign corporation, which, under the act, had no preference whatever.

It is not insisted by us and it would be ridiculous to say that because the assignee of the foreign corporation happened to be a Tennesseean such Tennesseean would have any different right than such foreign corporation.

VI.

It is next insisted by counsel that there were no resident mortgagees before the supreme court of Tennessee, so as to call from that court any construction of this statute as to their rights and so as to deny privileges and immunities to non-resident mortgagees while granting them to the former. It is true that there were no resident mortgagees before the court, but it is also true that there were non-resident mortgagees and citizens before the court, and that by the enforcement of the act in question these non-resident mortgagees were denied rights and immunities which should have been granted to them under the Constitution of the United States, the said act properly construed denying such privileges and immunities to non-residents while granting the same to resident mortgagees, whether they were before the court or not. The ground on which the supreme court based their holding that plaintiffs in error were not entitled to the benefit of their mortgage is a matter well known to this court from the record in the case of Blake *vs.* McClung. It is true that that record is not evidence in this cause, but the decisions of the supreme court of the State, whether evidenced by duly printed books or by the written opinion or by their decrees, are matters open to and known to all, as matters of enunciated law, and of which all courts will take knowledge when brought before them, not, however, as evidence, but on the other ground.

For that reason it is known to this court that the supreme court of Tennessee decided against plaintiffs in error and all residents and citizens of other States on the ground solely that a State in admitting a foreign corporation to do business in it had the right to place any terms thereon which it deemed proper to impose, and that said court held in the cause of Blake *vs.* McClung, as well as in the cause at bar, that the State had the right to make any discriminations in favor of its own citizens and residents as against citizens

and residents of other States, whether such citizens and residents were mortgagees or simple contract creditors. Said court, being of that opinion and having so decided in this cause, had enforced said act against plaintiffs in error, and it is now the duty of this court, as we insist, to construe said act and to say what are the rights that are given under it to Tennessee mortgagees—whether those rights were determined by the supreme court of Tennessee or not—and when such rights of Tennessee mortgagees are determined by this court to say whether the supreme court of Tennessee in enforcing said act are depriving plaintiffs in error of a privilege and immunity by said act given to residents and citizens of Tennessee. It is not, therefore, a moot question, as insisted by counsel for "certain defendants in error." On the contrary, it may have been unnecessary for the supreme court of Tennessee to decide what right and immunity was granted to resident mortgagees, inasmuch as they excluded plaintiffs in error from participation on the broad ground that the Constitution of the United States in the particulars complained of here was not violated, as the State had the right to do the very act which it did, regardless of what privileges or immunities were granted to residents of Tennessee. The Federal question was passed on by the supreme court of Tennessee when the act was enforced in the teeth of the exceptions made by plaintiffs in error; and even if the supreme court of Tennessee did construe said act against plaintiffs in error—which is not true as to those rights and immunities granted to resident mortgagees of Tennessee—still we insist that this court has the right to make an independent construction of said act for itself, as the supreme court of Tennessee can no more by construction deprive plaintiffs in error of a constitutional right which this court thinks plaintiffs in error have than the legislature has so to do. As was said by this court in the cause of Yick Wo *vs.* Hopkins, wherein

was involved the constitutionality of certain ordinances of the supervisors of the county and city of San Francisco:

"The determination of the question whether the proceedings under these ordinances, and in enforcement of them, are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

118 U. S., p. 356.

In the above case the Supreme Court overruled the construction given said ordinances by the supreme court of California and declared them unconstitutional.

The following cases, we insist, support the contentions of plaintiffs in error:

Raby *vs.* Colchaur, 146 U. S., 153.

Johnson *vs.* Risk, 137 U. S., 300.

XIV Amendment.

IV.

As against the right of Carhart and Sully, trustee under mortgage executed, several points are made by "counsel for certain creditors" before mentioned, which were not fully considered in our original brief:

1. It is insisted that Carhart cannot claim a violation of the constitutional provision providing for the equal protection of the laws, because he was not within the jurisdiction of Tennessee.

Our insistence as to this is that the Carnegie Land Company was a foreign corporation, which having complied with the laws of Tennessee regulating the admission of such corporations into the State, which act declared such corporations, on compliance of certain terms, to be to all intents and purposes a domestic corporation, was within the juris-

diction of the State; and inasmuch as the rights of Carhart, mortgagee, to the security of the mortgage executed by said Carnegie Land Company depends upon the rights of said Carnegie Land Company, a solvent growing concern, to create said debt and to make said mortgage, and therefore as Carhart is in privity with said Carnegie Land Company, he has the right to make the question that the law which undertook to deprive him of his mortgage was a law which violated the Constitution of the United States as to the equal protection of the laws, in so far as it did deprive such corporations of the equal protection of the laws, such corporation being within the jurisdiction of the State of Tennessee. The question here is what right has Carhart and Sully, trustee, been deprived of as guaranteed to their vendor and through it to him under the Constitution of the United States? Said act being void as a violation of said provision of the Constitution as to their vendor, plaintiffs in error, Carhart and Sully, trustee, have the right, they being injured thereby, to have their right adjudicated in this court irrespective of said statute. We insist the following cases, by inference, support the above contention: Brown *vs.* Smart, 145 U. S., 454; Ludeling *vs.* Chafe, 143 U. S., 649. Perhaps the argument submitted in our original brief as to class legislation in this act is more appropriate under the provision of the Constitution providing for the equal protection of the laws rather than under due process of law; but while that is true, aside from the question as to whether plaintiffs in error are within the jurisdiction of Tennessee, we insist that there are certain attributes of classification under the statute which more particularly come within the due process of law guaranty, which may be involved and do not depend on whether plaintiffs in error are citizens of the State of Tennessee, and which are treated in our original brief under the head of "due process of law." As has been said, "a law depriving all persons of a certain form of liberty, or freedom, or contract, &c., would be equal, but the

same would not be constitutional under the due process of law clause."

Guthrie on XIV Amend. to the Con., p. 109.

VII.

It will be observed that the authorities cited by counsel as to insolvent laws have no application to a case of this kind, wherein is involved the constitutional right of parties to make and to take mortgages, the mortgagee being a solvent and going concern. Cases as to the laws regulating insolvents and also as to the regulation of public corporations such as railroads and the payment of employés, where the safety and welfare of the State are involved through a public corporation, have no application to this case. Neither does the regulation of insurance policies, 172 U. S., 562, where the said regulations apply equally to domestic and foreign insurance companies and are reasonable and appropriate as regulations and not oppressive or discriminatory, affect the question here presented. Nor do the mechanic lien cases, such as that in 101 U. S., 443, cited, nor the regulation of railroads, which are public trusts in their nature for the protection of those damaged in person or property in the actual operation of the same, to the benefit of the mortgage or protection of the pledge, affect the doctrine which we contend for, as to the infringement upon the right of contract of a private corporation in this State. Great reliance is placed by counsel on the case in 113 U. S., 515, as to lien for water rents having priority over mortgages, but while it is stated in this case by this court that the mortgagee takes notice of the law existing at the time the mortgage is taken, the decision nevertheless is placed upon the ground that the water rents are for the benefit of the common pledge in the same way as the mechanic's lien. As to taking notice of the law which undertakes to make unconstitutional regulations of the rights of parties, that was distinctly repudiated in the case of Blake

vs. McClung, the court saying that citizens of other States were not precluded because they contracted with notice of the law which gave Tennessee creditors an immunity and privilege not granted to them.

It is contended by opposing counsel that in the event Carhart succeeds and the Travelers' Insurance Company fails in securing priority for their mortgages, Tennessee creditors are still entitled to priority over Carhart's mortgage because said mortgage on the hotel property was taken subject to the Travelers' Insurance Company's mortgage. We insist that it is mere sophistry to say that the act, unconstitutional as to Carhart's mortgage, is yet effective so as to deprive him of it by virtue of the self-same act. The situation is this, as we see it: Carhart's lien is good against everybody, if the act is unconstitutional, because:

1. The Tennessee creditors lose their priority under the act.

2. The Travelers' Insurance Company in such an event, and if the act is good as to it, has no right it can make effective in this case and in this court as against Tennessee creditors or Carhart.

It is the same as if the Travelers' Insurance Company's mortgage were invalid or paid off and discharged so far as every one in this court is concerned. Certainly the Tennessee creditors cannot hold up the Travelers' Insurance Company's mortgage as a shield against Carhart's rights when said mortgage is dead in its owner's hands.

Respectfully submitted.

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No. 266.
Brf. of Baxter for Def.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No. 266.

Wilberforce Sully, Trustee; Wilberforce Sully in his own right, Alfred B. Carhart, Mrs. Mary P. Myton and The Travelers' Insurance Company, Plaintiffs in Error,

versus

The American National Bank et al.

Reply Brief, on Behalf of The Defendants In Error, The American National Bank, Shields Bros. and Scioto Star Fire Brick Works.

E. J. BAXTER,
Sol. for Defendants in Error.

DEADERICK & EPPS,
E. J. BAXTER, of Counsel,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR. THE AMERICAN NATIONAL BANK ET AL.

A statement of the case is fairly made by appellants in their briefs, and further mention will not be made except by reference to the record in argument.

Plaintiffs in error, seek a re-examination, by this court, of the decree rendered by the Supreme Court of Tennessee upon the ground that the Act of the General Assembly of Tennessee passed March 19, 1877, being chapter 31 of said Acts, is

unconstitutional, as being in violation of Section 2 of Article 4 of the Constitution of the United States, which is as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

And of Section 1 of the 14th Amendment to the Constitution of the United States which is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of Tennessee held, that the Act of 1877, Chapter 31 of the General Assembly was not in controvention or violation of either of the Articles of the United States Constitution, as above quoted.

The defendants in error, The American National Bank, Shields Bros. and Scioto, Star Fire Brick Works, filed a bill in behalf of themselves and all other creditors of the Carnegie Land Company, under and in pursuance of the Statute of 1877, which Statute had been sustained by the highest Court of the State prior to the filing of this bill and prior to the execution of any of the contracts sought to be enforced.

The various courts of the State sustained their contention in this instance, and the assets of the corporation were decreed to be distributed in accordance with the provisions of that Act.

Record page 47.

The bone of contention in this case is the distribution of assets amounting to $66,123.31.

Record page 145.

The amount decreed to creditors resident in Tennessee was $29,377.36 as having accrued prior to Nov. 23, 1891, the date of registration of the Travellers' Insurance Company's mortgage.

$13,794.35 accrued after Nov. 23, 1891 and prior to Feb. 10,

1893, the date of registration of the mortgage to Wilberforce Sully, trustee.

$1,860.97 accrued after Feb. 10, 1893.

Record page 144.

$35,406.19 was due The Travelers' Insurance Company, a corporation of the State of Connecticut, and was secured by a mortgage registered Nov. 23, 1891.

$105,124.99 was due Wilberforce Sulley, trustee, and A. B. Carhart residents of New York, and was secured by mortgage registered Feb. 10, 1893.

Record page 144.

The total indebtedness of the Carnegie Land Company was $271,321.55.

Record page 145.

The decision of the highest court of a State, that a statute is not in conflict with the Constitution of the State is conclusive upon all the courts of the United States and will not be reviewed by them. But, if the ground of invalidity urged against the statute is, that it contravenes the Federal Constitution, or an Act of Congress, the Federal Courts will not be bound by the decisions of the State Courts.

Atlantic & G. R. Co. v. Georgia, 98 U. S. 359.
Louisiana v. Pillsbury 105 U. S. 278-294,26 L. ed. 1090-5.

It is urged with equal emphasis, that the validity of an Act of Congress may be passed upon by the State Courts, until it has been settled by the Supreme Court of the United States.

Lent v. Tilson 140 U. S. 316.

The statute of 1877, ch. 31 having been declared by the Supreme Court of the State to be a valid enactment, since the date of its passage, and creditors resident within the State have contracted with the Carnegie Land Company under said statute and with reference to the provisions thereof.

Non-resident creditors contracted with this corporation, with notice of this statute, and under its terms and provis-

ions. The laws enacted by the General Assembly of a State are for the public good and all are presumed to know them.

Will this Court say, although there has been a well established precedent as to the validity of the statute, that resident creditors must yield their rights? Would not such reasoning create a more serious interference with the property rights of the Tennessee creditors than would be remedied by giving new property right to non-resident creditors, who had not contracted for them under the statute?

Where state decisions establish a rule of property rights, this Court, if it is possible to do so, will adopt and follow the settled rule of construction affixed by the State court of last resort, to the statute law of the state. And this rule obtains whether the decision of the highest court of the State declaring the validity of the statute was delivered before or after the property rights have attached.

Burgess v. Seligman 107 U. S. 20-34: 27 L. ed. 359-365.
Miller v. Ammon, 145 U. S. 423: 36 L. ed. 761.
Warburton v. White (No. 101) decided by this Court Feb. 26, 1900.

The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under and in pursuance of the Act are concerned. Their validity and obligation can not be impaired by any subsequent decision altering their construction.

This doctrine applies as well to the construction of the organic law, as to the construction of a statute.

Louisiana v. Pillsbury 105 U. S. 278-294: 26 L. ed. 1096.
Douglass v. Pike Co. 101 U. S. 686.

A mortgage given upon property situated in Tennessee, by an insolvent corporation doing business in said State by legislative permission, securing non-resident creditors, which, when foreclosed as was intended at the time, by the party executing the mortgage, would result in defeating bona fide creditors, will be controlled by the laws of the State of Tennessee in determining the rights of the parties thereunder.

Etheridge v. Sperry, 139 U. S. 276-277: 35 L. ed. 176.
Purifier Co. v. McGroarty 136 U. S. 241: 34 L. ed. 348.

The Travelers' Insurance Company came into Court and submitted its case upon the contract it had made with The Carnegie Land Company as it stood under the decision of the State Court.

It did not raise any question in the lower court against the validity of the statute under which it had contracted, on the Constitutional question here urged, and having failed to make that defense against the statute in the lower court, it will not be permitted to raise the question for the first time in an appelate court.

The question must be presented to the court below and be decided adversely to plaintiff in error before this court will have jurisdiction.

Church v. Kelsey 121 U. S. 282:30 L. ed. 960.

In order to give this Court jurisdiction of a writ of error to review a judgment of the highest Court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have have been specially set up or claimed at the proper time and in the proper way

If it was not claimed in the trial Court, and therefore, by the law and practice of the State, as declared by its highest Court, could not be considered by that Court; or if it was not claimed in any form before judgment in the highest Court of the State, it can not be asserted in this Court."

Morrison v. Watson, 154 U. S. 115:38 L. ed. 929.

It is the well settled law in the State of Tennessee that unless questions are specifically raised by the pleadings in the lower court the appellate or Supreme Court will not permit it to be raised for the first time in that court.

The failure of a party to raise the objection below is fatal and he can not claim protection under the objections made by another party to the record.

Campbell v. Railroad, 98 Tenn. 128.
Denton v. Wood, 86 Tenn. 37.
Rule 29 of Supreme Court, 85 Tenn. 737.

Does the statute of 1877, as complained of, take away fundamental right and exclude a judicial inquiry of liability? Certainly not.

It has made no contract for the parties, and seeks to make none.

The statute simply prescribes what may be done, and if a non-resident seeks to come into a State and contract with a resident of that State, he is presumed to do so with full knowledge of the requirements of the statute. Risk, therefore, can only come from his failure to observe due care, such care, as might be supposed without promptings from the law.

The Carnegie Land Company was a non-resident corporation, incorporated under the laws of Virginia, but doing business in Tennessee, by Legislative authority. The authority of the corporation was, therefore, statutory, and it could not, execute a preferential trust or mortgage in violation of its statutory authority. This is elemental.

Purifier Co. v. McGroarty 136 U. S. 237; 34 L. ed. 346.

It is the law of Tennessee, of long standing, having been so declared by the Supreme Court of the State, and under such statutory conditions, all contracts are made, and property held.

Such discretion is reasonable, not oppressive or discriminatory, so as to render it subject to constitutional objection.

Whatever a State may do with corporations of its creation it may do with foreign corporations admitted into the State.

Hooper v. California 155 U. S. 648; 39 L. ed. 297.
Insurance Co. v. Doggs decided by this Court January 16, 1899.

A legislative enactment is the law of the State and must be controlling upon corporations and citizens of the State with respect to their rights to acquire property and to enter into contracts.

Such legislation is reasonable and no abridgment of the Federal Constitution.

The parties seeking relief in this court upon the theory that the Act of the Tennessee Legislature (1877 ch. 31) is uncon-

stitutional in that it deprives them of property without due process of law, are non-residents of Tennessee.

In so far as the question involves the rights of Plaintiff in Error, The Travelers' Insurance Company, a Connecticut corporation, it needs no further discussion here since the deliverance of this Court in BLAKE v. MCCLUNG 172 U. S. 239.

In that case the Court says: "A corporation of another State can not invoke the Constitutional guaranty of equal privileges and immunities of citizens in case of discrimination against it in favor of the residents of a State in respect to participation in the assets of an insolvent corporation."

Blake v. McClung 172 U. S. 239; 43 L. ed. 432.

If creditors, non-resident of Tennessee, insist upon the unconstitutionality of the Act of 1877 ch. 31, and claim an equal distribution in the assets of a foreign corporation being wound up under a general creditor's proceeding in the State Court of Tennessee, the spirit of the law governing their fundamental right would require them to show equal rights and privileges with the Tennessee creditors.

Has this been done?

(1) They are citizens of the State of New York contracting under the laws of New York and with a view of having the debt paid at the office of the company in New York.

(2) The Carnegie Land Company was a foreign corporation and the State had a right to make reasonable restrictions and limitations.

(3) Wilberforce Sully, trustee, was the treasurer of the Carnegie Land Company and knew of its financial condition at the time of the issuance and sale of the bonds to A. B. Carhart and of the execution of the mortgage to secure same. And the Bonds and Mortgage referring to each other, would give the holder and owner of them full notice of all existing equities.

(4) The mortgage to Sully was made expressly subject to the terms of a prior mortgage and in recognition thereof and to that extent must abide the fate of that mortgage.

The policy of the law is to secure resident creditors of a foreign insolvent corporation as against foreign creditors as to the assets within the State.

May v. First National Bank 122, Ill. 551.
Woodward v. Brooks, 128, Ill. 222.

The above principle may well be doubted as the correct principle of equity in a commercial country, if the Constitutional theory of the government is such that it fosters the free and untrammeled commercial relationship between the different States of the Union.

If that theory be correct, State lines should place no limitations or restrictions upon the full and complete enjoyment of that guaranty.

Any other view would place a premium on provincialism and retard interstate and international comity.

But, every State owes protection to its own citizens and when non-residents deal with them it is a just and legitimate exercise of authority to hold and appropriate any property owned by non-residents to satisfy the claims of its citizens.

Brogg v. Gaynor, 85 Wis. 468.
Penoyer v. Neff, 95 U. S. 714.

If, therefore, the equitable maxim of equality is equity, is sound doctrine in fundamental principle, before the plaintiffs in error in this particular case can claim that constitutional guaranty, they must show equality of fundamental right, and this is not done under the facts of this record.

A contract made in one State to be performed where made, is governed by the laws of that State, notwithstanding the obligation may be secured by a real estate mortgage in another State.

Pingree on Mortgages Sec. 795.
Cope v. Alden 33 Barb. 352.
Mills v. Wilson 88 Pa. 118.
Chase v. Daw 47 N. H. 405.
Story on Conflict of Laws, Sec. 243-4, 272, 287.
Cope v. Wheeler 41 N. Y. 308.
Pritchard v. Norton 106 U. S. 124.
Coghland v. R'y Co. 142 U. S. 112.: L. ed. 954.

The very debt which Wilberforce Sully, trustee, is seeking to collect by this proceeding is a New York contract debt secured by a mortgage in Tennessee and the very terms of the mortgage make the payment of his debt subject to the payment of The Travellers' Insurance Company's mortgage.

Having contracted that way, and pleaded that way in reliance upon his mortgage, if he has a status in court it must be based upon the terms of his mortgage contract and his debt would only be good and his lien take effect from the date of registration of his mortgage, to-wit: Feb. 10, 1893.

The reasonableness of the rule can be seen at a glance; a corporation organized in another State, locates its plant in Tennessee contracts and is contracted with by the residents of Tennessee while the Treasurer of the corporation is yonder in the metropolis of the country issuing bonds against the corporation for more than the value of the entire plant, and a mortgage is executed to the treasurer as trustee to secure the bonded indebtedness. The mortgage is put to record and all the resident creditors of the State are defeated.

Reverse the rule: The Legislature enacted the law of 1877, which is notice to the world of the rights and privileges of resident Tennessee creditors, and the man or corporation in a foreign State must inquire as to the nature of his security which is only the natural thing for a cautious business man to do.

The court will enforce the contract made by the parties and in doing so keep within the purview of the 14th Amendment to the Constitution of the United States.

A suit in equity to establish a trust in the legal holder of the title to property is "due process of law," within the meaning of the 14th Amendment.

Church v. Kelsey 121 U. S. 282:30 L. ed. 960.

Where a corporation or citizen of one State contracts with a corporation or citizen of another State, and secures his note or bond by a mortgage upon corporate property, the debt and the mortgage as incident thereto will be enforced unless it is against public policy or in violation of the constitution.

Courts will not make, alter or modify the terms of a contract.

The holder of the debt and the mortgage have acquired property rights, and property within the meaning of the constitution, includes contracts necessary for its enjoyment, protection, use, and disposition.

Protection of property includes within it, necessarily, protection of its mortgagee in all the incidents of his contract security.

Coal Co. v. People, 22 L. R. A. 340; 147 Ill. 66.
Frorer v. People, 16 L. R. A. 492; 141 Ill. 171.
People v. Gilson, 109 N. Y. 389.

It is an inherent and inalienable right to make contracts.

Leep v. St. Louis, 23 L. R. A. 264.

Under the Constitution and under the construction given to such contracts by the courts these rights are property rights, and under the 14th Amendment will be preserved and protected, therefore, the property rights of the mortgagees, plaintiffs in error, were fixed by the registration of their mortgages and they were justly entitled to and can claim, under the Act 1877 ch. 31, payment of their respective mortgages, in the order of their registration—payments being made out of the proceeds of the property covered by the mortgages and after all debts and contracts prior to such registration have been removed.

The right to make such contracts is one the of attributes of property, and to deprive a person of that right is depriving him of property within the meaning of the Constitution.

Re. Jacobs, 98 N. Y. 98.
American Reports, Vol. 50, page 636.

This is a fundamental right, brought to this country by its Pilgrim Fathers and wrested from time to time, in the progress of history, from the sovereigns of the English nation.

It can not be denied that the parties claiming under The Travelers' Insurance Company's mortgage are entitled to a lien from the date of registration of its mortgage.

The lien of the Sully-Carhart mortgage would date from its registration.

The parties were in a position at that time to frame their contracts and to bind themselves, subject only to the general laws forbidding those contracts which are immoral and illegal.

State v. Loomis, 21 L. R. A. 789.
Bertholf v. O'Reiley, 74 N. Y. 515.
52 American Rep. 34.
Cooley Const. Lim. 6th ed. 431.
San Mateo Co. v. Southern P. M. Co. 13 Fed. Rep. 145.
Slaughter House case, 111 U. S. 746: 28 L. ed. 585.

These are private rights, and "due process of law" is that course of legal proceedings according to the rules and forms of law which have been established for the protection of private rights.

Davidson v. New Orleans, 96 U. S. 103: 24 L. ed. 619.
Westervelt v. Gregg, 12 N. Y. 209.
Munn v. Ill., 94 U. S.: 113: 24 L. ed. 77.

The General Assembly of any State has the power to prescribe the terms upon which a foreign corporation may enter within its territory for the purpose of conducting its business, but that power is limited by Sec. 2 Art. 4 of the Constitution of the United States.

The State can not pass a law to defeat a vested right, or impair such a right, under due process of law.

Plaintiffs in Error in this case had no rights to be defeated or impaired until their contracts were completed in the registration of their mortgages and by registering a mortgage they could not defeat a prior vested right under the Constitution and laws of the State.

In the free exercise of the privileges and immunities granted to citizens of the several States by the Constitution, these mortgagees perfected their rights and it would be no infringement upon such a right under the supreme law of the land to compel them to stand upon their rights as thus contracted without any interference with the statutory law of the State as to rights accruing thereunder prior to the mortgagee's contract.

Such an interpretation of the law is both reasonable and just and can not be declared hostile to the fundamental rights guaranteed to the citizens of the several States.

There has been no interference with or impairment of a fundamental right granted or secured by the 14th Amendment to the Constitution of the United States.

Slaughter House Cases 83 U. S. ; 21 L. ed. 394.
Presser v. Ill. 116 U. S. 252; 29 L. ed. 615.

Magna Charta, Article fifty six declares: "No free man shall be taken, or imprisoned, or disseised, or outlawed, or banished, or anyways destroyed, nor will the King pass upon him or commit him to prison, unless by the legal judgment of his peers, or, by the law of the land."

This great and wise statement has always been regarded as the great safeguard of liberty and has been incorporated, though not in the same language, in every American Constitution.

"Due process of law" or "the law of the land" being the more familiar expression to us, but these expressions are exactly equivalent in import.

Davidson v. New Orleans, 96 U. S. 97.

While that ancient, significant and historical interpretation of these words is of value, it is not exclusive; as centuries are numbered even the foundations of liberty may be modified.

For courts to determine otherwise would be to deny every quality of the law but its age and render progress and improvement, not only unnecessary, but impossible. The very fountains of justice are not exhausted, and new and varied forms of experiences may shape this honored declaration into new but not less useful forms,

Hurtado v. California 110 U. S. 516; 28 L. ed. 232.

As to the language taken from Magna Charta and incorporated into the Constitution, after all has been said, it was only intended to secure and protect individuals in the enjoyment

of the established principles of private rights and distributive justice.

Leeper v. Texas, 139 U. S. 462; 35 L. ed. 225.

In judicial proceedings, "due process of law" or "the law of the land" requires that the party shall be properly brought into court, and when there, shall have the right to set up any lawful defense to any proceeding against him.

There is no judicial proceeding in this case depriving any of the parties of property rights under the legislative enactments of the State, but a judicial declaration of these rights as they existed by contract.

Record, page 87.

The question of "due process of law" as contained in the 14th Amendment to the Constitution of the United States does not mean by judicial proceeding, and is foreign to the issue here.

McMillan v. Anderson 95 U. S. 37; 24 L. ed. 335.
Kelley v. Pittsburg 104 U. S. 78; 26 L. ed. 658.

"Due process of law" in a State is regulated by the law of that State.

Walker v. Sauvinet 92 U. S. 90; 23 L. ed. 678.

The law of Tennessee having been declared by the Supreme Court of the State, we insist that it is in harmony with the "law of the land."

The Supreme Court of Tennessee in passing upon the question say: "A statute is the law of the land" which embraces all persons who are already or who may thereafter come into similar situations, conditions, and circumstances "

Henley v. State, 98 Tenn. 698, and authorities cited.

This is not class legislation, there is nothing vicious nor forbidden in it. It applies equally to corporations and individuals that are or may put themselves into like situation or circumstances, and is therefore a natural and reasonable

classification which meets the requirements of such legislation.

Railroad v. Harris, 99 Tenn. 703, citing authorities.
Cooley Const. Law, 249.
Hayes v. Missouri 120 U. S. 68; 30 L. ed. 578.
Maryland v. Broadbelt, 45 L. R. A. 436, citing numerous authorities.

It was recently held by this Court, "that a statute permitting an attachment against a non-resident debtor without a bond, while requiring a bond for an attachment against a resident debtor, does not constitute a denial to the non-resident of the equal protection of the law, because it was within the power of the legislature to divide debtors into two classes—non-resident and resident—and when so classified, to prescribe different methods of proceeding against them."

Central Loan and T. Co. v. Com. Co., 178 U. S. 84; 43 L. ed. 628.

Again it is insisted that plaintiffs in error failed to avail themselves of their constitutional right to invoke the aid of this Court by failing to raise this Federal question in the Chancery Court where the cause was first heard. And Wilberforce Sylly, trustee, A. B. Carhart, Mary P. Myton and E. C. Manning failed even to raise the question of the unconstitutionality of the Act in the Supreme Court and it is raised here for the first time by them.

Under the rules of this Court they have not put themselves within its jurisdiction. And under the rules of the State Court, all questions must be fairly raised and presented, and relied on by all the parties in the lower Court in order to claim the benefits of a reversal in the Appellate Court. This rule is true, even upon exceptions to a Master's Report under a valid decree, unless the exception is specifically made and relied on it is beyond the control and revisory power of the Appellate Court.

"This is so, though the defendants affected be infants and the report erroneous upon the proof."

Allen v. Shank, 90 Tenn. 377.
Henley v. State, 98 Tenn. 689.
Pollard v. Wellford, 99 Tenn. 114.
Gribble v. Wilson, 101 Tenn 616.
Enc. Plead and Prac., Vol. 8, page 287 et seq.

This court has held in numerous instances that if a party in the statement of his own claim, does not disclose a Federal question, he does not create jurisdiction by anticipating what some other party to the record claims or may claim. And the mere suggestion by a party in his pleading that a State statute is void because in contravention to the Constitution of the United States, is insufficient to give jurisdiction.

Florida Cent. & P. R. Co. v. Bell, decided February 26, 1900, and reported in advance sheets under date of March 15, 1900, at page 402.

The attention of the Court is called to the fact that Complainants in Error have wholly failed to place themselves within the rule giving the Court jurisdiction upon the Federal question urged by them.

(1). They failed to raise the question in the trial court.

(2). It can not be raised for the first time on appeal. Shelby County v. Bickford, 102 Tenn. 395.

(3), When raised for the first time in the Court of Chancery Appeals was not specified, but was too general, vague and indefinite to bring it within the rule.

The language of the exceptor being: "7. By writ of error, complainant excepts to that part of the decree which holds the Acts of 1877 and 1891 constitutional, and thus giving Tennessee creditors' debts previously contracted, priority." The Judges cases, 102 Tenn., 511, citing with approval, State v. Henley, supra.

(4) The exception as above quoted was only made by complainants Carhart and Sully, Trustee, and in the Appellate Court. Carhart, alone filed exceptions based upon that exception.

Rule 29 of the Supreme Court of Tennessee 85 Tenn. page 757, is as follows:

"In all civil causes on the dockets of this Court in the several grand divisions of the State * * * and in all causes hereafter appealed or on writ of error to this Court, it shall be the duty of the appellants or plaintiffs in error, their attorneys or solicitors, to file on or before the first day of the term to which appeals have been or may hereafter be taken, or are

triable, specific assignments of error to the rulings of the courts below, as well as to errors of fact, pointing out definitely the error or errors complained of, and citing in the most concise manner the specific testimony relied upon, designating page of record" &c.

"If this rule is not complied with the judgment or decree will be affirmed, unless strong and sufficient reasons are shown for the failure."

"Errors not embraced in assignment will be treated as waived."

Rule 29, supra.

It is proper to say that one of the complainants in the original bill, Scioto Star Fire Brick Works, is a corporation organganized under the laws of Ohio, and this original complainant does not stand in the same attitude as the other complainants.

It was not contended in the court below, nor is it contended here, that its rights are equal with the rights of the other complainants.

The decree of the court postponed the payment of its debt in the order hereinbefore mentioned.

The claim of Shields Bros., another one of the original complainants, was for a very small sum, to-wit, about $150.00, and this party has informed us by letter that he does not desire to prosecute his contention in this court, as the amount of his claim would not justify such action on his part.

This refusal, however, on the part of Shields Bros is not intended to be construed as, in any way, conceding the contention of plaintiffs in error, and such contention is not now conceded.

The law of Tennessee having been declared by the Supreme Court of the State, we insist that it is in harmony with "the law of land." And submitting the question of jurisdiction in this Court as well as the equality of fundamental rights under "the law of the land," we ask for an affirmance of the decree.

E. J. BAXTER, Sol. for Defendants in Error.
DEADERICK & EPPS,
E. J BAXTER, of Counsel.

No. 266.

Brf. of Williams for Def.

Supreme Court U.S.
FILED
APR 25 1900
JAMES H. MCKENNEY,
Clerk.

Filed April 25, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 266.

WILBERFORCE SULLY, Trustee, et als.

vs.

AMERICAN NATIONAL BANK, et. als.

IN ERROR TO SUPREME COURT OF TENNESSEE.

BRIEF AND ARGUMENT IN BEHALF OF CERTAIN DEFENDANTS IN ERROR, BY

SAM'L C. WILLIAMS,
Solicitor.

JOHN H. BOWMAN,
of Counsel.

BRANDON, GADSDEN & CLEVE, PRINTERS

Supreme Court of the United States.

OCTOBER TERM, 1899.

WILBERFORCE SULLY, TRUSTEE, ET ALS.,
v.
AMERICAN NATIONAL BANK, ET ALS.

No. 266.

BRIEF IN BEHALF OF CERTAIN OF THE DEFENDANTS IN ERROR, WHO ARE CREDITORS RESIDING IN THE STATE OF TENNESSEE.

STATEMENT OF CASE.

The writ of error in this cause is sued out to attack Tenn. Act 1877, Ch. 31, Sec. 5, as unconstitutional, in behalf of two distinct classes of creditors of the Carnegie Land Company; to-wit: (A) Creditors who are general unsecured claimants, asserting rights in conflict with those asserted by the other class; to-wit: (B) Creditors who claim under two separate mortgages, the Travelers' Insurance Company, a body corporate with *situs* in the State of Connecticut, and A. B. Carhart, a resident of the State of New York.

The Travelers' Insurance Company is the adjudged owner of the indebtedness of $35,406.10 secured by its debtor, the Carnegie Land Company, by a deed of trust to the Connecticut Trust and Safety Deposit Company, of Hartford, Connecticut, as Trustee, upon the property (real and personal) known as the Hotel Carnegie property, in Johnson City, Tennessee. Said trust conveyance was registered Nov. 23, 1891: Petition, Rec. 34: Stipulation, Rec. 144.

It will be noted that, while the said Trustee is made a party to the record below, it is not made a party *in anywise* to this writ of error.

The said A. B. Carhart is the adjudged owner of $85,000.-00 of bonds, (aggregating, with accruals of interest, $105,-124.99) secured by a mortgage or trust deed, to Wilberforce Sully, as Trustee, upon the above mentioned Hotel Carnegie property, subject to the above recited mortgage securing Travelers' Insurance Company, and also upon certain other realty of Carnegie Land Company not covered by the mortgage securing that Insurance Company.

The mortgage to Wilberforce Sully, Trusustee, was registered February 10, 1893: Stipulation, Rec. 145.

An error in the statement by plaintiffs in error is: That A. B. Carhart raised the constitutional "questions now involved in the *lower courts* and in the Supreme Court of Tennessee." The facts are that these questions were raised for the first time in an appellate court—the Court of Chancery Appeals, *after a limited appeal* from the lower court, upon writ of error by said Carhart, directed by the appellate court to Chancery Court at Johnson City: Bill of Carhart, Rec. 14; Petition, Rec. 36; Opinion, Rec. 69.

It is admitted that A. B. Carhart, in his capacity of complainant-mortgagee only, raised the constitutional questions before disposition of the cause on appeal, but it is denied that he raised the questions otherwise, or prior to appeal. The immunity was not set up in the trial court: May, Supreme Court Practice, 92; 123 U. S., 181; 153 U. S., 538; 160 U. S., 646.

There being two distinct classes among the plaintiffs in error—general unsecured creditors and mortgagees—these defendants in error will first reply to the errors assigned in behalf of the general unsecured creditors.

BRIEF AND ARGUMENT.

A.—RIGHTS OF GENERAL CREDITORS.

The plaintiffs in error, A. B. Carhart, Mrs. Mary P. Myton, and Wilberforce Sully, as assignee of the claim of E. C.

Manning against the Carnegie Land Company, it is apparent, can only hope to recover out of the assets in event the mortgages aforesaid fail in the maintenance of the liens of their respective mortgages. The mortgage debts aggregate, as has been seen, above $140,000.00, while the entire assets produced a fund of only $66,123.31 : Stipulation, Rec. 145.

I. PRIVILEGES OF STATE CITIZENSHIP.—These particular plaintiffs in error assign as error that Act 1877, Ch. 31, Sec. 5, is unconstitutional under U. S. Constitution, Art. IV, Sec. 2, because said Act, while giving the privilege as to priority of satisfaction out of the Carnegie Land Company's assets to residents of Tennessee, denies a like privilege to them as citizens and residents of the State of New York.

Said Section 5, is as follows : "The (foreign) corporations and the property of all corporations coming under the provisions of this Act, shall be liable for all debts, liabilities, and engagements of said corporation, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition."

(a) *Are these plaintiffs in error "citizens ?"*— It is agreed that none of these persons attempted to prove in what jurisdictions they were *citizens*,, respectively : Rec. 147. It further appears that none of them *in pleading*

averred *citizenship* in any State of the Union: Rec. 14, 36. It does appear that A. B. Carhart and Mrs. Myton, (not E. C. Manning) in pleading averred, and in proof showed, their place of *residence* to have been the State of New York.

The adjudication made in the case of *Blake v. McClung*, 172 U. S. 239, is referred to as conclusive of the status of plaintiffs in error as to citizenship. The records in that case and in the one at bar are by no means identical, in respect to this matter. In the case of *Blake v. McClung*, the *pleadings* of the prevailing plaintiffs in error, filed in the Chancery Court, stated "that they were residents of Ohio, engaged in business in that State, their residence, offices and places of business being at the city of Cincinnati, *and they were citizens of the United States and not citizens of Tennessee.*" It further appeared to this Court that "*no question has been made* in the State Court that the individual plaintiffs in error were not citizens." 172 U. S. 246.

In the case at bar it appears from the record that these plaintiffs in error in pleading did not aver citizenship in New York, citizenship of the United States, or non-citizenship in Tennessee. Further and especially, these plaintiffs in error did not, in the Chancery Court at Johnson City, make any averment or raise any question *as to citizenship or constitutional right depending thereon, respecting which any proof would have been applicable.* To put it otherwise: there was no issue that would have made proof of the citizenship, as contradistinguished from the residence, of plaintiffs in error, relevant. If, *during the entire proof-taking time*, no such question was made, can it in fairness be said that the parties treated proof of residence equivalent to proof of citizenship? If an inference is to be drawn it will be one of fact, one of a probative fact, and such proof or inferences of probative facts can only arise under an issue to which they can be referable. Will this Court go further than it did in *Blake v. McClung* and rule that without any sort of question, depending for solution upon proof of citizenship, being raised or pleading otherwise, in the only court of proof,

and without proof of citizenship, the presumption will be indulged in this Court that a resident of New York was a citizen of that State, touching a right that inheres in citizenship?

The question has been answered by this Court: "The averment that a party resides in a particular State does not import that he is a citizen of that State (cases cited). *Upon like grounds* the jurisdiction of this Court to re-examine the final judgment of a State Court cannot arise from mere inference, but only from *averments so distinct and positive* as to place it beyond question that the party bringing a case here from such court *intends to assert a Federal right:*" Stave Company v. Butler County, 166 U. S. 655.

The record clearly distinguishes this case from *Blake v. McClung* in this respect. If proof without proper pleading will not support a decree in equity, it would seem that lack of both pleading and proof as to this point will not support a jurisdiction thus distinctly restricted by this Court.

That this constitutional question was raised by Carhart in the Court of Chancery Appeals, under a writ of error specially *sued out for that sole purpose*, is clearly shown by the opinion of that Court: Rec. 69.

There should be no inference of fact indulged against defendants in error on a question that was raised after the time for taking proof was past: May, Sup. Ct. Prac., 92.

But it is argued that the stipulation of counsel states that plaintiffs in error were "non-residents of Tennessee *within the meaning* of Act 1877, Ch. 31;" and that, as this Court in another case (*Blake v. McClung*) construed the word "resident" to be the equivalent of "citizen," this stipulation amounts to an agreement that certain of plaintiffs in error are citizens of New York.

There are three answers to this unique contention: (a) An agreement that a person is *not a citizen* of Tennessee, *but is a resident* of New York (Rec. 147) is by no means an admission that he has a constitutional status of a *citizen of New York*. (b) It will not be inferred that a decision in

Blake v. McClung (December, 1898,) sheds light upon the record in this cause, the final decree in which was passed by the Supreme Court of Tennessee in November, 1898, or upon an undated stipulation respecting said final decree. (c) It plainly appears that the counsel of defendant in error did not mean to admit that the citizenship of plaintiffs in error was proven. They caused the insertion of a later clause which set forth that no attempt was made to establish the *citizenship* of said persons: Rec. 147.

If the construction is placed upon the stipulation contended for by plaintiffs in error, it will be against the real intent of the defendants in error; by a play on words taken from an opinion in a cause to which they were not parties, as to which some of them and their counsel, at least, were in ignorance. The stipulators were ten in number: Rec. 147.

(b) *As respects E. C. Manning (and his claim), there is failure to show even residence.*—The claim of E. C. Manning amounts to about $46,000.00, and its *status* is a matter of no inconsiderable moment. This claim was transferred to Wilberforce Sully, pending the litigation in Chancery Court at Johnson City.

(1.) There appears in the record no *averment by pleading* that E. C. Manning is either a resident or citizen of any particular jurisdiction.

(2.) There is no proof or admission respecting the residence or citizenship of said Manning. It is admitted in the stipulation that the residences of the parties in interest are as therein indicated. It is indicated that Wilberforce Sully, *assignee* of said Manning, is a resident of the State of New York, but nowhere is the residence of the *assignor* indicated. This failure to show in the Agreed Record the residence of Manning was not accidental. If permissible, under the rules of this Court, to look to the full transcript of the record in this Court, and beyond the printed record, it will be found that the report of the master in equity, confirmed by the chancellor, contained this find-

ing in reference to said E. C. Manning claim: "XI 5. Wilberforce Sully, a resident of New York, debt by judgment in favor of E. C. Manning, of Washington, D. C., assigned by said Manning to said Sully, $46,577.15."

Thus, if we look only to the printed record, it contains neither averment nor proof of the residence, (not to mention citizenship,) of Manning. If we look beyond to the transcript, it is found that Manning was a resident of the District of Columbia, which is not a State within the meaning of the Federal Constitution. If Art. IV, Sec. 2, is invoked, it must be because of a right inhering in one by reason of his *State* citizenship, and Manning not being a resident of a State of the Union has no status thereunder.

A State, in the meaning of the Constitution, does not include that District: Hepburn v. Ellzey, 2 Cranch, 455; and the *status* of only a State citizen may be reviewed in this Court as to infringement of the Constitution: Miners' Bank v. Iowa, 12 Howard, 1, cited in Lyon v. Woods, 153 U. S., 661; Scott v. Jones, 5 How., 343.

A citizen of the District of Columbia is not a citizen of a State, within the sense of the Judiciary Act, as to removal of causes: Cameron v. Hodges, 127 U. S., 325; Hooe v. Jamieson, 166 U. S., 395. Or within the meaning of the same Act, Section 25, in respect of the jurisdiction of this Court to review judgments of State Courts: Miners' Bank v. Iowa, *supra.*

The distinction between States and Territories is drawn in this *same article* (Art. IV, U. S. Constitution, Secs. 2 and 3), and privileges and immunities guaranteed only to citizens of States.

(c) *Residence and citizenship that of original contractor.*—If Manning's residence is not shown, then the demand that he transferred to plaintiff in error, Sully, can not have the status of a preferred claim—equality with residents of Tennessee, even though Sully be treated as a *citizen* of the State of New York. It clearly appears from the opinion and decrees of the Tennessee Appellate Courts, that

they construed Act 1877, Ch. 31, Sec. 5, to give priority to the claim of a resident creditor only in event he *affirmatively* showed that the particular claim was created or incurred to or with him, originally; that if a note were executed by the Carnegie Land Company to a resident of Kentucky, and the same were by him endorsed to a resident of Tennessee, the latter would not have priority; conversely, that if the note were executed to a resident of Tennessee and endorsed by him to a resident of Kentucky, the latter would have the *status* of a Tennessee resident-claimant.

This was the contention made by the counsel of Sully in respect of another claimant in the State Courts: Rec. 121, 122.

And the Courts responded, sustaining his contention: "Is the American National Bank, confessedly a resident creditor, entitled to the preference given by the statute with respect to its debts assigned to it by a party *whose residence is not disclosed in the record?* The majority of the Court hold that before this bank is entitled to put this debt on the preferential footing given by the statute, it was its duty to make it *affirmatively appear* that it had not been assigned to it by a non-resident of the State."

So that it matters nothing what was the residence or citizenship of the assignee, Sully. Before he is entitled, under this construction of the statute by the State Courts, to the priority of a resident of Tennessee, or (since *Blake v. McClung*) to the priority of an individual citizen of another State, he must affirmatively show that his assignor had the *status* of a resident of Tennessee, or of a citizen of some State of the Union. This he has failed to do. *Non constat*, the debt on which Manning himself recovered was originally contracted to a non-resident corporation, and transferred to him. The burden was upon this claimant to show the status of the original creditor holding the claim.

A. B. Carhart and Mrs. Mary P. Myton, as general unsecured creditors on certain notes, also failed to comply with the requirement as to the burden of proof.

Wilberforce Sully, it will be noticed, purchased another claim and had it assigned to him—that of W. E. Maiden; and, finding that he could carry the burden of showing a constitutional *status* for his said assignor, did so: Rec. 60, 69.

(d) *Priority to those only whose claims antedate mortgages.*—There was a requirement imposed by the Tennessee Courts, in order to the *status* of a creditor entitled to priority of satisfaction over the mortgages. All creditors alike (residents and non-residents) were postponed who failed to show that their claims were not incurred subsequent to the date of the registration of the mortgages respectively—subsequent to the attaching of the lien of the mortgages.

This rule was likewise contended for in the Courts below by the counsel of the plaintiffs in error: "We take it that it will not be disputed that before a claim can have the *status* of a Tennessee creditor, whose debt was *contracted before the registration of the mortgage*, it must show itself entitled to that *status*—must show its priority": Rec. 122.

The Court responded by a favorable ruling, and even went to the point of disallowing attorneys' fees, validly contracted for, in notes given to creditors prior to mortgage-registration, unless it were shown that the fees were earned prior to the lien of the mortgage: Rec. 72.

None of the plaintiffs in error show either by their pleadings or in proof, that their claims arose prior to the liens of the mortgages or either of them. The last mortgage was registered February 10, 1893. A. B. Carhart avers that as to the note and mortgage bonds pledged as collateral thereto, his claims arose March 1, 1893; Mrs. Myton that her claim arose May 25, 1893; as to the Manning claim, there is no averment or proof to show when it arose.

If these plaintiffs be entitled constitutionally to the *status* of residents of Tennessee under *Blake v. McClung*, then they have failed to show themselves prior in right to the mortgage claimants, or to share defendants' priority, in that they fail

to prove creation of their claims before the registration of the mortgages.

The requirement of the statute and the State Court that claimants should so show the date of creation of their claims, as a condition to their sharing in the assets preferentially, will not be interfered with by this Court: Castillo v. McConnico, 168 U. S., 680, and cases cited.

As we have seen, if plaintiffs in error have not priority over the mortgages, these mortgages, or even the second one, will more than consume the assets before their claims are reached, and the debate becomes a moot one.

Thus, failing to show themselves entitled to share with defendants in error, in that they failed to show that their demands antedated the mortgage lien, every one of these plaintiffs in error must fail of relief. They fail on a question other than a Federal one: Castillo v. McConnico, *supra;* Gillis v. Stinchfield, 159 U. S., 600; Harrison v. Morton, 171 U. S., 47.

The purpose of Art. IV., Sec. 2, "was to declare to the several States that whatever those rights, as you grant or establish them to your citizens, *as you limit or qualify or impose restrictions* on their exercise, the same *neither more nor less*, shall be the measure of the rights of citizens of other States": Slaughterhouse Cases, 16 Wall., 36; Blake v. McClung, 172 U. S., 257.

(e) *Failure to except, appeal and assign errors below.*—All of the plaintiffs in error standing in the right of general unsecured creditors, saving only A. B. Carhart, must also fail on these grounds: (1) They did not except to the master's report postponing their demands to the satisfaction of the mortgages; (2) they did not appeal from the decrees of the Chancery Court at Johnson City, thus postponing them and denying them the status of residents of Tennessee; (3) they did not, in the Appellate Courts of Tennessee, assign errors or cross-errors, challenging the attention of the Courts to their rights, statutory or constitutional—particularly, they failed to raise, in any of

the courts of Tennessee, a Federal question to support their present writ of error. And herein:

(1) In Tennessee the rule of law is that a party who fails to except to a report of the master under a reference, will not after confirmation be heard to complain. The report is conclusive on appeal. Even a minor appellant thus failing will be barred of relief: Grinstead v. Huggins, 13 Lea, 731; Gibson's Tenn. Ch. Prac., Sec. 598. Even though the appeal be a broad one: Owens v. Pearce, 5 Lea, 466.

The Court of Chancery Appeals recites the names of the various exceptants (those appealing and those not appealing) and the names of Mrs. Myton, E. C. Manning or Wilberforce Sully, as his assignee, do not appear: Opinion, Rec. 60.

Had these persons appealed, their appeals would have been ineffectual and dismissed for this reason, and a Federal question would not have availed them.

(2) These two claimants did not except to or appeal from the decrees of the Chancery Court at Johnson City: Rec. 51, 52.

It is contended, however, that inasmuch as A. B. Carhart and others appealed, and, as is further contended, relief ought to have been granted said Carhart where it was denied, this Court will, if it grants Carhart relief, at the same time open the decree of the several Courts of Tennessee so as to grant like relief to Mrs. Myton and Wilberforce Sully as Assignee of E. C. Manning.

(aa) There was no broad appeal except by one party—Travelers' Insurance Company. The appeals of all others were special. The rule in Tennessee is that an appeal by an *antagonistic party*, even though a broad one, will not avail his opponent. Thus, where an appeal is broadly taken by a complainant, and the respondent attempts to have the Supreme Court adjudge in his favor a question that has been decided in the lower court against him, but to correct which adverse adjudication he

did not appeal, it will stand and the Supreme Court will refuse to review it: Shields v. Alsup, 5 Lea, 524; Smith v. Gooch, 9 Lea, 536. Here the plaintiffs in error, who are general creditors, were in direct antagonism to Travelers' Insurance Company. Their claim is that they should have priority over that Company's mortgage along with others.

If it be contended that Mrs. Myton and Sully, assignee of Manning, stand with Travelers' Insurance Company in such a sense as to put them in a class with it, entitled to the relief awarded to it, then Travelers' Insurance Company, being a foreign corporation and not entitled to the protection of Art. IV., Sec. 2, properly failed in reversing the lower court in the Tennessee Appellate Courts, and this non-success would have likewise affected those seeking the benefit of the Company's broad appeal.

The broad appeal of Travelers' Insurance Company would not cure the failure of these persons to except to a report under reference: Long v. Read, 9 Lea, 544; Henderson v. Donovan, 13 Lea, 293.

(bb) But it is argued that Mrs. Myton and Sully, assignee of Manning, stand in the same right with A. B. Carhart, who did appeal to the Tennessee Appellate Courts, and that since Carhart is a non-resident individual, entitled, the argument proceeds, to the protection of Art. IV., Sec. 2, this Court will grant them a like measure of relief, notwithstanding their own failure to except or appeal from the decrees of the Chancery Court. It will be noted that *Carhart's appeal was special*, and in Tennessee a special appeal brings into review only the particular matters specified: Wharton v. Lavender, 12 Lea, 179; Wood v. Cooper, 2 Heisk., 441; Bell v. Horn, 1 Shannon Tenn. Cas., 589; Loftis v. Loftis, 94 Tenn., 237.

It will be further noted that even Carhart so restricted his *appeal* as to carve out any chance to complain that constitutional privileges and immunities had been denied him by the Chancellor: Rec. 50, 51. And in order to make this question, which was an after-thought purely, Carhart prose-

cuted a special writ of error, supplementing his special appeal: Rec. 69. Of course, on writ of error, only the rights of the *plaintiff in error*, particularly referred to in the petition for the writ, are brought into review. Had the Supreme Court of Tennessee granted Carhart his claim to the protection of Art. IV., Sec. 5, it could not under its procedure have granted like relief to one who did not join him in the writ of error, but who acquiesced in the decree rendered below.

(cc) It is not the law in Tennessee that, in event of a broad appeal and grant of relief to the one creditor who appeals, a like measure of relief will inure to a non-appealing creditor against the same estate.

There is a rule in that State that in event there is a broad appeal by one person standing *in the unity of right* as another non-appealing party, the decree will be molded to meet the rights of both as there determined. Thus, a successful broad appeal by one heir will avail a non-appealing heir, *when their common estate is affected:* Allen v. Shanks, 90 Tenn. (6 Pickle), 382. A broad appeal by a dowress will affect and avail her own children, heirs, in respect of a *common estate:* Parsons v. Kinzer, 3 Lea, 352. A broad appeal by one partner will avail a non-appealing partner: Butler v. Kinzie, 90 Tenn. (6 Pickle), 32.

But it will be noted that in all of these cases there appeared a unity or quasi-unity of interests. In the last named case, the Court calls attention to the difference between such joint or mutual interest, and distinct rights: Butler v. Kinzie, *supra*, citing 2 Coldwell, 271.

"The doctrine has never been applied where there are no joint or common interests": Jardon v. Hollister, 2 Coldwell, 271. Thus, in equity causes, where there is a decree against a principal and his surety, and the principal alone appeals, no relief is grantable to the surety: "If the surety wishes the decree reviewed as to himself, he must do so on the same terms as other defendants, by giving bond as required by law": Bottoms v. Leatherman, 3 Legal Rep. (Tenn.), 135;

S. C., 3 Shannon Cas., 269; Briggs v. Hinton, 14 Lea, 236; 4 Baxter, 217; 8 Humph., 489. An appeal by one of two tenants in common and modification in his behalf, does not avail the non-appealing tenant: Morgan v. Hannah, 1 Shannon Cas., 28; S. C., Thomp. Tenn. Cas., 44; Reeves v. Murphy, 1 Shannon Cas., 424.

And the Tennessee Court has decided the exact point here made by said plaintiffs in error against them: Where two distinct creditors file a bill in equity against the administrator of a decedent for recoveries and an accounting as to decedent's personal estate, which bill is dismissed as to one of said complainant creditors, but sustained as to the other; and where the latter, unsuccessful, creditor alone appeals, it was held that "the demands of complainants were unconnected with each other, upon which separate suits might have been brought; each complainant stands on his own right of action. And this is so even in the incidental *matter of account*, as much so as if the bill had been filed by one of them *for himself and other creditors*, and the other had *come in by petition*, and had himself made a party": Cooper v. Lyon, 9 Lea, 600.

Therefore, the appeal of Carhart, had it been a broad one, would not have availed the other plaintiffs in error, who intervened by petition on distinct causes of action.

Where the parties interested in the allowance of an amount made by the master have not appealed from the decree of confirmation, the allowance must stand. The rule is common to this Court and the Courts of Tennessee: Goodwin v. Fox, 129 U. S., 601; Cleary v. Foundry Co., 132 U. S., 612; U. S. v. Blackfeather, 155 U. S, 311.

In the Appellate Court a party not appealing cannot take advantage of an error in the decree committed against himself; if he desires to avail himself of such error, he should take a cross-appeal, failing in which he admits the correctness of the decree as to him: Chittenden v. Brewster, 2 Wallace, 199; Loudon v. Shelby Co., 104 U. S., 778.

Had these rights been reviewable in the Supreme Court, that court demands specific assignments of error by any person asking relief, and the record shows that neither of these plaintiffs assigned errors there: 86 Tenn., 37, 500; 89 Tenn., 775 (rules same as this Court's).

Had they assigned errors, the rule of that Court is that they would not be considered where a question is thereby raised that was not made in the pleadings or noticed in proof, in the court below: Stainback v. Junk, 98 Tenn., 306.

Furthermore, the effect of the existence of an intermediate Appellate Court in Tennessee must be considered. Where no appeal is prayed by a defendant from an appeal of the Chancellor, and no point is made in the Court of Chancery Appeals upon the rights of such defendant, the Supreme Court of Tennessee will decline to review his rights, even though he appeals from the decree of the Court of Chancery Appeals. In the case at bar, Mrs. Myton and Manning's assignee failed to appeal from the decree of the Court of Chancery Appeals as well as from that of the Chancellor: Pile v. McCoy, 99 Tenn. (15 Pickle), 367.

(3) The said two plaintiffs did not at any time in the Courts of Tennessee, raise the Federal question (violation of Art. IV., Sec. 2, of the Constitution,) relied upon here to reverse their decrees.

This is conceded by counsel for said plaintiffs in error, who claim, however, that the raising of that Federal question by their co-plaintiff in error will inure to their benefit.

No intendments are indulged respecting the raising of a Federal question below. It should *unmistakably* appear that the question was *properly* raised in the State Court: Brown v. Colorado, 106 U. S., 97.

The attention of the court below must not only be called to the particular clause of the Constitution, but also to the *right plaintiff in error* claims under it: Forney v. Towle, 1 Black, 350. The Federal right must be *personal* to the plaintiff in error: Missouri v. Andrews, 138 U. S. 497. The

right must be claimed by each person for *himself*, not for another: Hale v. Gaines, 22 Wall, 161; Miller v. Bank, 106 U. S. 542, and cases cited; Long v. Converse, 91 U. S. 105. When raised by a defendant in error, it cannot avail a plaintiff in error: Manning v. French, 133 U. S. 190. What if the question raised by Carhart had been decided by the State Court in his favor, would Mrs. Myton have *status* here, and the Court jurisdiction? Manning v. French, *supra*. It appears that Travelers' Insurance Company undertook for itself to raise the Federal right under Art. IV, Sec. 2. It is clear that it has no *status* under that clause of the Constitution; (Blake v. McClung, 172 U. S. 250). Had Travelers' Insurance Company and Mrs. Myton been the only plaintiffs in error, and had the Insurance Company thus failed, would Mrs. Myton have *status*, and the Court jurisdiction?

The Insurance Company raised its own Federal question, that of privileges and immunities of State citizenship; whereas, its only *argument in this Court* is directed to rights under the Fourteenth Amendment. *Non constat*, had Mrs. Myton raised a Federal question, it would have been denial of process of law under Fourteenth Amendment. Will the Court impute to Mrs. Myton a better record as to the raising of a Federal question, than has been made by diligent and able counsel for the Insurance Company for it?

This Court has put the point thus: "Under what clause of the Constitution did plaintiff in error make his claim? The record does not show. For aught that appears in the record, some other clause in the Constitution may have been relied upon, etc. The clause should have been specified by plaintiff in error in the State Court, in order that this Court might see what was the right denied them:" Maxwell v. Newbold, 18 How. 516.

If these two plaintiffs in error are assumed to have raised the Federal question, will this Court also assume that the Supreme Court of Tennessee would not have precluded them on other valid grounds? Their demands were not fought in that Court since it was immaterial, in the then

condition of the record, whether Manning's claim was $46.00 or $46,000.00—it did not reach to actual recovery. There were, in fact, valid defenses to said claim, that would have been urged had it claimed any *status* other than the one given it.

It thus appears that these two appellants, without excepting to a report of the master, without excepting to the decree of confirmation, without praying an appeal therefrom, without assigning errors to call attention to their supposed rights, without excepting to the decree of the Court of Chancery Appeals, without appealing therefrom, without assigning errors in the Supreme Court, and without so much as saving exception to the decree of that Court, ask this Court to decree them rights they never thought of asserting, until *after* the ruling of this Court in *Blake v. McClung*, 172 U. S. 250.

If any of these questions of State procedure or law are determinable against these plaintiffs, this Court will not assume jurisdiction: Klinger v. Missouri, 13 Wall. 257.

II. FOREIGN CORPORATION NOT ENTITLED TO PRIVILEGES AND IMMUNITIES IN QUESTION —The Travelers' Insurance Company, it is clear, has not a *status* as a general creditor to share with Tennessee residents on terms of equality: Blake v. McClung, 172 U. S. 251.

B.---RIGHTS OF MORTGAGEES.

I. UNDER ART. 4, SEC. 2, U. S. CONSTITUTION. —It appears that one of the mortgagees, A. B. Carhart, is a non-resident individual. If it should be held against our contention—*ante* A.—I (a)—that he is, upon this record, also a *citizen of New York*, we shall have next to consider whether said Carhart has been denied a privilege or immunity, inhering in such citizenship, by that portion of Tenn. Act 1877, Ch. 31, Sec. 5, which provides that the lien of mortgages shall be subject to certain debts against the mortgagor.

The argument is that the lien of a mortgage if taken by a resident of Tennessee is not subjected to such priorities, and that the mortgage if taken by a citizen of another State is made so subject; that, therefore, the resident citizen of Tennessee is granted an immunity which must likewise be granted to a citizen of the State of New York.

(a) The fallacy affecting this argument is in the assumption that there is any discrimination as to rights claimed under mortgages held by citizens and non-citizens of Tennessee. The language of the statute is: "Nevertheless, creditors who may be residents of this State shall have priority in the distribution of assets, or subjection of same or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors," for all debts made or owing by the corporation previous to the registration of such mortgage or rendition of such judgment.

This language shows that the lien of a mortgage, whether executed to secure a Tennessee or a New York creditor, shall be subject to certain previously contracted debts. It will be noticed that the clause, "being residents of any other country or countries," succeeds and qualifies "simple contract creditors," and not "mortgage or judgment creditors;" that the Act does not read "*such* mortgage or judgment creditors," or "mortgage or judgment creditors so residing." The statute as written gives to residents of Tennessee priority over *all* mortgages the liens of which after-attach.

Every rule of statutory construction will compel that holding, it would seem. And herein—

(1) "Primarily, a statute is to be interpreted according to the proper grammatical effect of the arrangement of the words in the act. Qualifying phrases should be confined to their next antecedent, in the absence of punctuation showing a different intent." By this test all mortgages are subjected.

(2) There are presumptions, in the construction of statutes, against their being instruments of injustice, against a construction that would work inconvenience or absurdity in its practical operation. These presumptions are common to the Tennessee Courts and this Court: U. S. v. Kirby, 7 Wallace, 482; Oates v. Bank, 100 U. S., 239; Washington, etc., Co. v. Company, 160 U. S. 354; Railroad v. Horne, 1 Coldwell (Tenn.) 77.

(a) It needs no argument to show that a construction that would subject the lien of all mortgages alike, would be more consonant with justice.

(b) The construction contended for by these defendants in error is the only one that would not make the statute work absurd results and great inconvenience in enforcement. Let us assume that the $300,000.00 of bonds secured by the blanket mortgage to Wilberforce Sully, Trustee, registered Feb. 10, 1893, had been placed in the hands of financial agents in New York for sale by subscription, and had been purchased by residents and citizens of all the States and by aliens in London. Now, let us assume (as plaintiffs in error contend) that a citizen of Tennessee purchasing and holding one of the bonds is entitled in respect of it to the lien of the mortgage without subjection to previously created claims, while a citizen of Kentucky, as a holder of like bond, is not. The bonds are made payable to bearer. They pass in open market into many hands; they bear no indorsements to indicate the first holder—who is entitled or not (as his residence may have been) to the enforcement of the lien of the mortgage without subjection. The legislature will be taken to have known the probable methods and results of such a bond issue, and the inconveniences and absurdities attending an attempt to protect a resident of the State claiming, as a bondholder under such mortgage, priority over other bondholders and antecedent creditors.

Again, all mortgages secure bonds *equally and without preference*. It is not to be presumed that the statute

intended to disturb the ordinarily understood rights, and customs obtaining in the financial world, further than its terms necessarily compel.

(3) Kindred Acts of the same State may be looked to, as an aid to construction.

In 1873 the Legislature of Tennessee subordinated railway mortgages to certain claims against the mortgagor company, on causes of action antedating and postdating the lien of such mortgages, but Tennessee mortgagees were not excepted: Act 1873, Ch. 8.

In 1877, the same Legislature that passed the Act now in question, enacted another statute which provided that no railway company should create a mortgage on its property in Tennessee that should be valid as against judgments for materials furnished and damages done in the operation of the road, but all mortgagees were alike affected: Act 1877, Ch. 12.

(4) Both this Court and the Tennessee Court adopt the rule that one of two possible constructions of a statute will be adopted which will uphold it as constitutional. The presumption in favor of constitutionality obtains even *against* the more natural interpretation of the language used: Presser v. Illinois, 116 U. S., 252; Hooper v. California, 155 U. S. 657; Cole v. Mfg. Co., 90 Tenn., 466; Dugger v. Ins. Co., 95 Tenn., 245.

The construction contended for by defendants in error is the more obvious one, and in addition saves the Act from unconstitutionality.

(b) But counsel of plaintiffs in error argue that to place a construction on Act 1877, Ch. 31, Sec. 5, that would subject the mortgage lien of a resident or citizen of Tennessee, would be to make the statute work an absurd result. They say: "The proposition is, that a Tennessee creditor who has no judgment and no mortgage, shares with all other Tennessee creditors until the former takes judgment or mortgage, and by that act he loses his right to share with Tennessee creditors, and instead of getting a benefit by

his diligence,in case of subsequent insolvency, he not only loses the lien of his judgment or mortgage as to all debts contracted to Tennessee creditors before the registration or rendition, *but in addition loses the right that he formerly had as a general (unsecured) creditor.*"

Counsel have overlooked or misconceived the record and rulings of the State Courts to the effect that the statute only means to subordinate the lien of the mortgage or judgment—not to disturb the rights of the creditor who takes the mortgage or judgment as they stood antecedent to the attaching of the lien thereof. Such rights of such creditors are *not lost to them.* The statute was construed by the State Courts to grant the "prior lien" of the mortgage or judgment "against all debts which may be incurred subsequent thereto," but to deny such *priority of lien* only (and not the *debt* in its original *status*) to either mortgages or judgments, as respects antecedent debts.

And this was the application actually made by the Courts to the rights of parties. Thus: H. C. Jarvis, a resident of Tennessee, recovered a judgment against the insolvent Carnegie Land Company, and notwithstanding he thus became a "judgment creditor," he did not, on that account, lose his rights as they stood at the date his "debt was made." That claimant was given no *priority by reason of his judgment;* and he was forced back to his *status* and rights as they stood before his judgment was taken, the Court saying: "The real difficulty in connection with this claim is over the contention whether the claim should be treated as a debt as of the date of his decree, *or as of the date of his right to recover.* Manifestly, his right of action existed long before the Land Company placed any mortgage upon its properties:" Rec. 80, 81.

Frame King, a non-resident of Tennessee, standing in the right of Jas. H. Preas, a resident of Tennessee, notwithstanding the claim was reduced to judgment, was permitted to share in the assets. He did not lose his *status* of general unsecured creditor in becoming a judgment creditor; but

he was not granted any priority on account of his judgment. The Court adjudged: "The Court of Chancery Appeals was in error in depriving Jas. H. Preas of the right to share in the assets to the extent of his payments, with interest, on his suretyship for the Carnegie Land Company to Frame King, such payments *to be prorated upon as of date of suretyship, Dec.* 23, 1891,"—not as of date of the judgment: Decree Supreme Court, Rec. 88; date of judgment June 8, 1893, Rec. 82.

Wilberforce Sully, as assignee of W. E. Maiden and wife, Sully a non-resident standing in the right of his assignors, was placed in the class of Tennessee creditors entitled to priority, notwithstanding judgment had been taken on the claim; but the intervenors were remitted to the *status* the claim had on date of its creation, and were granted no priority because of the judgment.

Nowhere in the record does it appear that a Tennessee resident was granted any privilege or immunity because of a judgment taken or mortgage held by him. On the contrary, they have been forced in every instance to proof and position of original *status* of the particular claim.

The contention of, and construction of the statute by, plaintiffs in error, if correct, would grant to a resident of Tennessee who has reduced to judgment a demand of a corporation of Virginia, contracted with it but transferred to such Tennessean (thus becoming a "judgment creditor") over residents of Tennessee. However, the contrary of this was held by the State Courts in respect of several claims: e. g., Carnegie Iron Co., a foreign corporation, claim assigned to A. R. Wing, a resident of Tennessee, who took judgment thereon, but was denied right of priority: Rec. 73, 74.

Therefore, the actual construction placed on the Act being contrary to the contention of the plaintiffs in error, this Court will not undertake to reconstrue the Act or adopt another construction of this State statute: Missouri Ry.

v. Nebraska, 164 U. S 414; and cases cited; Phoenix Ins. Co. v. Gardner, 11 Wall. 204.

Under this construction by the State Court, if Carhart has, to the Court's satisfaction, shown himself to be a *citizen* of New York, he is as such entitled to share with residents of Tennessee, as a *general unsecured creditor*, in the priority over his own mortgage, *provided* he can show that his debt from the Carnegie Land Company was created before, and not after, the attaching of the mortgage lien. If he had rights before the registration, as a general creditor, they were not lost to him by the lien of the mortgage. He only loses the right to assert that *lien* (not his debt so contracted) as against antecedent creditors, residents of Tennessee, and non-resident individuals (*Blake v. McClung*) But Carhart shows on the face of his pleading that his claim arose March 1, 1893, by note, to which he took the mortgage bonds as collateral security. He thus fails to bring his debt within the antecedent class: *Ante* A.—I (d). On the same facts a resident of Tennessee would have been postponed in like manner, and, in fact, were so postponed.

(c) Opposing counsel do not undertake to state or argue that the State Court, having resident mortgagees and non resident mortgagees before it in contest, denied privileges and immunities to the latter, while granting them to the former; as was the case in *Blake v McClung*, *supra*. The argument, rather, is that the statute is *subject to a construction* that would cause discrimination between resident and non-resident mortgagees, against the latter; not that the statute was so construed and enforced.

The question thus made is a moot one. It will be time enough to pass upon the discrimination when it occurs—not by way of hypothetical assumption that, had there been Tennessee mortgagees before the State Court they might, under one of two constructions of the statute, be granted the immunity in question. This Court will decide such constitutional questions only as the necessity arises: Baker v. Grice, 169 U. S., 292.

"Because a State statute might be construed so as to cause it to violate the Constitution of the United States, is not sufficient to raise a Federal question; but the right of the plaintiff in error is limited to the enquiry whether, in the case presented, the statute is so applied as to deprive him of his constitutional right:" Castillo v. McConnico, 168 U. S. 680; Phoenix Ins. Co. v. Gardner, 11 Wall. 204.

(d) The Travelers' Insurance Company being a corporation, is not entitled to relief under Art. IV, Sec. 2, *as a mortgagee*, even if A. B. Carhart, as a citizen mortgagee, is entitled to the protection of that clause of the Constitution: Blake v. McClung, 172 U. S. 250.

(e) If Carhart, standing on the lien of his mortgage of Feb. 10, 1893, is declared by this Court entitled, under Art. IV, Sec. 2, U. S. Constitution, to have been denied privileges and immunities granted to citizens of Tennessee; and, in addition, it be held that residents of Tennessee have, as just indicated, a constitutional priority over the mortgage of Travelers' Insurance Company of Nov. 23, 1891, then it must follow that residents of Tennessee have contractual (not statutory) priority over Carhart's mortgage, as to the Hotel Carnegie property, in this:

The statute constitutionally makes the first mortgage subject to residents of Tennessee and non-resident individual citizens: Blake v. McClung, *supra*. When Travelers' Insurance Company took that mortgage it did so with knowledge, and with an *implied contract* imposed upon it by law (Provident Institution v. Jersey City, 113 U. S. 515,) to take subject to the preferred class.

When the mortgage to Wiberforce Sully, Trustee, was executed on Feb. 10, 1893, it was on its face expressly *made subject* to the mortgage securing Travelers' Insurance Company. Sully, Trustee, and Carhart, bondholder, are therefore estopped to say that the first mortgage is in anywise invalid: Bronson v. Railway, 2 Wall. 283; Jerome v. McCarter, 94 U S. 734.

If B. takes subject (by way of statute and implied contract) to A., and C. take subject (by express contract) to B., then A. has priority over C. If C., by reason of a mortgage lien, receive the $25,000.00, the products of the twice-mortgaged property, he cannot hold same as against B.; neither can B. hold as against A. It will be noted that if C. recovers it will be by reason of the *lien of his mortgage*, and this he has voluntarily subjected to B's rights. The decree of the State Court is as to said property maintainable on this ground, even if Carhart's full contention under Art. IV, Sec. 2, in respect of his mortgage, be conceded him. If such constitutional right is here decreed to Carhart, as mortgagee, the Court is asked to indicate how far that would disturb this rule of general jurisprudence, as relating to decrees renderable by the State Supreme Court.

II.—UNDER FOURTEENTH AMENDMENT TO U. S. CONSTITUTION.—Certain of the plaintiffs in error, Wilberforce Sully, Trustee, A. B. Carhart and Travelers' Insurance Company assigns as error that they were denied by the State Court the protection of the Fourteenth Amendment.

(a) *Equal protection of the laws.*—Neither of these plaintiffs in error was a person "within the jurisdiction" of Tennessee, so that they were not denied the protection of that clause of the Amendment which guarantees the equal protection of the laws: Blake v. McClung, *supra*. And such right is not asserted in argument.

(b) *Due process of law.*—But the insistence is, that due process of law has been denied them.

It would seem that this question was settled against plaintiffs in error by this Court in *Blake v. McClung*, *supra*. There it appeared that under this same Act of 1877, Ch. 31, a citizen of Virginia, within the meaning of this clause, was denied the right to participate upon terms of equality with residents of Tennessee in the distribution of assets of a foreign corporation doing business in Tennessee. The contention there made by such citizen of Virginia was that he was

denied due process of law, in that he was denied by the Act the right to proceed to judgment, execution, and satisfaction, or to intervention, on terms of equality with Tennesseans. The contention here is that the plaintiffs in error were deprived of obtaining *mortgage security* for indebtedness without submitting to the same priority. In both cases, in the last analysis, the thing complained of is subjection to a preference in behalf of a class. In the one case, the denial was of the right to take mortgage without this condition; in the other the denial was of the right to obtain for a debt in existence satisfaction or security by the usual processes of law. In neither case can it be said that the respective plaintiffs in error were *deprived* of their property: Blake v. McClung, *supra.*

Plaintiffs in error argue that under the Act their mortgages were permitted to become first liens, and that such first liens were "taken away by the accidental happening of an unforseen contingency, not contracted for—insolvency." It is a mistaken assumption that plaintiffs ever had priority of right over the defendants in error by reason of their mortgages, or that the character of their liens ever changed. It is true that they had *liens* on the property, but those liens were *in and from their inception* subject to the statutory priority. This priority was not so much a lien as a preference, and may be likened to preferences or priorities of United States, States, partnership creditors over individual creditors, claims of the character shown in Frazier v. Railway, *post*, Provident Institution v. Jersey City, *post.*

Furthermore, this subjection of the mortgage liens is not confined necessarily, though it be applicable usually, to administration of corporate assets in insolvency; but this preference may take place in "the subjection of any part of the assets;" very much as intervene the rights of firm creditors in event a levy is made on firm assets by a creditor of one of the members of the firm.

If the question is to be debated anew, then there are numerous cases holding that on the facts here appearing, the mortgagees were not denied due process of law.

(1) *As to power to restrict right to contract.*—Each State has the power by general laws to regulate the conveyance and disposition of all property, real and personal, within its jurisdiction; Brown v. Smart, 145 U. S. 454; U. S. v. Fox, 94 U. S. 315.

The right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the State without violating this amendment: St. Louis Railway v. Paul, 173 U. S. 404; Orient Ins. Co. v. Daggs, 172 U. S. 562.

The right of a State to deny to corporations the right to mortgage their property or to regulate the exercise, is undoubted: 3 Cook., Corp. Sec. 859; Jones, Mort. Sec. 124.

And equally clear is the right by statute to prescribe that a mortgage, if so executed, shall carry rights which shall be subordinate to those of a preferred class. Thus a provision subordinating a corporate mortgage to after-arising claims for labor and material, etc., are valid: Brooks v. Ry. 101 U. S. 443; Gilchrist v. Helena Ry. 58 Fed. Rep. 708; 2 Jones, Liens, Sec. 1628; Central Trust Co. v. Sloan, 23 Am. & Eng. R. Cas., 398.

And the priority need not be to laborers or material men who preserve or add to the value of the mortgage premises, as adverse counsel contend. Thus, injuries to persons or property of others may constitutionally be made superior even to a *previous* mortgage: Central Trust Co. v. Sloan, *ante;* Frazier v. Ry. Co., 88 Tenn., 160, affirmed by this Court, 139 U. S. 288, involving Act 1877, Ch. 12, mentioned above, and involving a claim that in nowise affected the preservation or increase of the mortgage property.

This Court has also held that the Legislature may validly enact that the lien of a mortgage upon realty, executed after the Act, shall be subordinate to a charge for water rents made by the Act a preferred claim upon the realty; and such Act is not in contravention of the Fourteenth Amendment, even though the State Court construe such water rents not to be valid as taxes or as special assessments, but

upholds same as against the mortgage lien on the ground that the mortgagee had taken its mortgage impliedly assenting or contracting with reference to the law governing water rents. The Court said: "The mortgagee chose to take its mortgage subject to this law; and it is idle to contend that a postponement of its lien to that of water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction:" Provident Institution v. Jersey City, 113 U. S. 515.

Bondholders under such a mortgage take their securities with notice of, and subject to, the Act, also with notice of the *status* of a company coming in thereunder: McCormick v. Bank, 165 U. S. 538; Edwards v. Kearzey, 96 U. S. 595, 601; 3 Cook, Corp. Sec. 859; Va. Development Co. v. Crozier, 90 Va. 126; S. C. 44 Am. St. Rep. 893.

The case at bar is only made stronger by the fact that the mortgagor was a foreign corporation, relieved by this Act from the penalties of alienage as to its estate, on condition that its property should stand in the first instance as security for a preferred class.

(2) *As to arbitrary class legislation.*—The further contention is made that the Act is obnoxious to the objection that it creates an arbitrary class.

(a) The arbitrary class, according to the argument, is not the *preferred* class—residents of Tennessee. Indeed, when that class was not enlarged by the entry into it of non-resident individual citizens, the Act was not held to be in contravention of Fourteenth Amendment: Blake v. McClung, *supra*. Thus enlarged to include statal citizens, it cannot contravene that Amendment.

(b) The arbitrary class created is said to arise in the segregation of foreign corporations engaged in mining and manufacturing from all other foreign corporations, and the regulation of their estates, by this rule of priority, while other foreign corporations escape.

1. Classification is not forbidden by this Amendment; the Legislature may distinguish, select and classify, and necessarily the power must have a wide range of discretion, and the classification is not reviewable unless palpably arbitrary: Orient Ins. Co. v. Daggs, *supra*, and cases cited. This Court has said that whether the classification is the best that could have been made is not for it to decide. Its province is only to determine whether it could be done at all, and under any circumstances. The Legislature is presumed to have known the conditions prevailing in its State: Dow v. Beidleman, 125 U. S. 680. The Amendment does not prohibit legislation limited to objects to which it is directed, by territory, as cities from country districts: Hayes v. Missouri, 120 U. S. 68; regulation of warehouses in one city: Munn v. Illinois, 94 U. S. 113; regulation of passenger elevators confined to large cities: Budd v. N. Y., 143 U. S. 517.

And may validly classify thus: Express companies may be included, while railway companies carrying express are excluded: Ex. Co. v. Seibert, 142 U. S., 339; sales made on 'change included and other sales excluded: Nicolls v. Ames, 173 U. S. 521; foreign from domestic corporations: Fire Asso. v. N. Y., 119 U. S. 115; Pembina Co. v. Pa., 125 U. S. 653; A's business from B's where they are of distinct character: Magoun v. Bank, 170 U. S. 283; as between different users of steam power, in respect of fires: Ry. v. Mathews, 165 U. S. 25; as between plaintiff and defendant in respect of attorney's fees: Atcheson Co. v. Mathews, 174 U. S. 913; holdings of land above from those under a certain acreage: King v. Mullins, 171 U. S. 435; one turnpike from others: Covington Co. v. Sanford, 164 U. S. 590; railways of less than fifty miles length from those above: Ry. v. N. Y., 165 U. S. 630.

2. The argument was directed in the case of *Blake v. McClung* to the point of arbitrary class legislation. Counsel for plaintiffs there, said in written argument: "It is true, as a general proposition, that it is not within the Fourteenth Amendment to with-

hold from the States the power of classification, and if that the laws enacted by State legislatures deal alike with all of a certain class they are not obnoxious to the charge of denial of equal protection, and yet it is equally true that such classification cannot be made arbitrarily:" Record in Blake v. McClung, 16141, Argument, p. 28. But the Act was held not to contravene the Fourteenth Amendment: 172 U. S. 260.

At the same term of this Court the exact question was also decided in the case of Orient Ins. Co. v. Daggs, 172 U. S., 562, wherein it was determined that the classification is not arbitrary where foreign fire insurance companies had certain burdens imposed upon them, not applied to other insurance companies.

3. Many reasons may be given why the classification of foreign corporations engaged in mining and manufacturing may be made to exclude foreign insurance companies, foreign railroad companies, etc. Insurance companies have practically no assets in the State; therefore, the Legislature may deem it proper to force them for the security of its residents to import assets, so to speak, in the form of deposit of securities as a condition precedent to the right of transacting business. A foreign railroad company has the most tangible and enduring asset in its road-bed, bridges, depots, etc., and no condition whatever may be thought necessary as to it. The Legislature may well deem assets of mining and manufacturing companies to be less enduring; their products peculiarly subject to be shipped out of the State; their existence as going concerns more speculative, and manipulation more likely in their affairs.

The facts of this case furnish the very strongest vindication of the justness of the legislative policy exhibited in the Act. The office of the Treasurer of Carnegie Land Company was in New York, and its accounts and funds and securities were subject to be kept there. Residents of the State may be deemed not to have had a fair chance of gaining knowledge of the financial condition of a corporation to

which they were lending credit, and which, by their credit, they were building up. The stockholders' meetings were, of necessity, held out of the State; and if a mortgage bond issue were purposed, it may well have been thought, residents of Tennessee were not on equal terms with those of Virginia, where it was competent for the Legislature of that State to have forced publicity of such purpose by advertisement in advance of meeting. In event of insolvency of the Carnegie Land Company, it was competent for the Courts of Virginia to draw into administration there all the assets of this Land Company not found in Tennessee, and in so doing to give priority to creditors holding sealed evidences of indebtedness over those who did not, whereas, seals are abolished in Tennessee, and its residents would thus by indirection be left unprotected. If the stock of the Company were "watered," the jurisdiction, it has been repeatedly held, is solely with the forum of the corporation's domicile to *found administration* for the purpose of calling the stock for the satisfaction of creditors; and calls are made or not, as the laws of Virginia, and not Tennessee, may decide.

In the case at bar, upon the authority of a stockholders' meeting of the Land Company, held in Virginia, a blanket mortgage securing $300,000.00 of bonds was placed upon the property of the Company; the bonds went into the hands of the Treasurer in New York; $85,000.00 of the bonds were by him pledged as collateral security for a note of $14,000.00 to A. B. Carhart, and for a note of $10,000.00 to Mrs. Myton—both being kinspeople of the Treasurer. The bonds were sold by the pledgees and bid in by themselves at the aggregate price of $13,000.00—the bonds, therefore, cost their present holders about fourteen cents on the dollar. It is claimed that they avail to bring to their holder the entire proceeds of the property of the insolvent Company. It appears that even the Secretary of the Carnegie Land Company, a resident of Johnson City, Tenn., was ignorant of all happenings after the bonds were executed, so that when he made up the schedule of the assets for general assignment purposes, he reported $300,000.00 of

bonds, the entire issue, *in the Treasury of the Company at New York.*

If Tennessee officials of the Company were ignorant to this extent, what must have been the plight of an ordinary Tennessee creditor? It is just and equitable for the Legislature to provide against the various forms of corporate manipulation, and for the protection of those who, in the inception of an enterprise, grant it credit, and sell it property that makes possible a mortgage. In the case at bar, if the mortgage plaintiffs in error prevail in this Court, they will receive the proceeds of sale of lands that were purchased of one of defendants in error and not paid for; carpets purchased of another defendant that were not paid for; furniture purchased of another defendant but not paid for; crockery purchased of another defendant but not paid for, etc. It surely is competent for a legislature to prescribe that any mortgage on such property shall be subject to antecedent rights.

4. It is argued in behalf of plaintiffs in error that although the Act may impose notice upon the mortgagee that he must take subject to antecedent debts, yet that the mortgage must really take in ignorance of the number and amount of such debts. We reply that he has a resort to the books of account of the corporation and to all sources of information the mercantile world affords as to *past* transactions. Defendants in error may, with greater force, argue that, without this statutory provisiou, they would be still more lacking in notice, and without ability to learn, of the execution of a mortgage, which at the time of their debts' creation may be in contemplation, but as to which no record may exist, the execution of the mortgage being in *futurity*.

(3) *Act* 1891, *Chap.* 122, *enlarged the class.*— Prior to the execution of either of the mortgages, to-wit: on March 26, 1891, the Legislature of Tennessee passed an act amending Act 1877, Ch. 31, so as to make it apply to *all* foreign corporations. Only mining and manufacturing corpo-

rations had been subject to these terms prior to that date; land companies were first affected, it would seem, unless perhaps their charters gave them manufacturing and mining powers, by Act 1891. The charter of the Carnegie Land Company is not shown so that its powers may be seen; but it incidentally appears that it had not manufacturing powers. When it was thought that the erection of an iron furnace would add to the value of its "boom" town-site, the Land Company did not assume to erect it under its own charter, but instead promoted the creation of a manufacturing company, the Carnegie Iron Company, for that purpose: Rec. 74.

At any rate the mortgagees cannot complain that class legislation as respects the Carnegie Land Company existed at the date their mortgages were executed.

(c) *Questions peculiar to Travelers' Insurance Company.*—(1) It appears that Travelers' Insurance Company did not, in the State Court, assign an error raising specifically any right in it under the Fourteenth Amendment. It did undertake to raise questions as to its rights under the Federal Constitution, but limited such rights to those guaranteed by Art. IV, Sec. 2: Rec. 92.

It is furthermore true that the State Court did not consider or discuss the rights of Travelers' Insurance Company to due process of law. All that appears, by fairest inference, is that it claimed privileges and immunities of statal and national citizenship, respecting both of which it is not a "citizen."

May, then, the Travelers' Insurance Company show jurisdiction in this Court to review the decree of the State Court as respects *its* right to *due process of law*, by showing that the State Courts passed upon the rights of A. B. Carhart to due process of law?

(aa) It is argued that the question of denial of due process of law was necessarily passed upon by the State Courts. It is replied that the right to raise this particular question was optional with the Insurance Company,

and waivable by it. It was clearly waived when that company assigned error under another clause of the Constitution; stood by and saw another party raise *this* question and exercised its judgment and option not to rely upon it, or to amend its assignment of errors so as to do so. May not a party make his own record and exclude from the State Courts' consideration any such question?

(bb) It is also argued that because Carhart raised this Federal question, the benefit of his doing so inures to the Insurance Company. The argument made, *ante* A–I (e) , is repeated in refutation. The Insurance Company hotly contested the mortgage claim of Carhart. Carhart raised this question under a writ of error, which carried up his rights alone. This Court, in a like condition of record, declined in *Blake v. McClung* to review the rights of parties who did not join in the writ of error: 172 U. S., 261. The State Court did the same thing.

The doctrine of substitutional raising of a Federal question, it is conceived, will not approve itself to this Court. *Quere:* Assume that Carhart, and not the Insurance Company, had been granted relief under his writ of error to the State Court on the ground of denial of due process, and that the Insurance Company had alone prosecuted the present writ. Would its doctrine of the substitutional raising of the question avail here? What if the Insurance Co., only, had raised the question of immunities of Statal citizens, and that Carhart, alone, had prosecuted this writ of error?

(2) It further appears that the trustee in the trust deed, securing Travelers' Insurance Company, in which trustee was lodged the legal title to the property, was made a party to the cause by the Travelers' Insurance Company: Rec. 35; and appeared with the Insurance Company defending against the mortgage of Carhart: Rec. 32.

The trustee has not joined in the writ of error, nor has severance been had as to it. Under all the authorities, it is

a necessary party to the record: O'Hara v. McConnell, 93 U. S., 154. Travelers' Insurance Company stands here alone asserting a right touching deprivation of property—that relates to the title if to anything—a right that belongs to the trustee. Not having joined it in the writ, or severed as to it, no relief is grantable: Garland's Fed. Prac., Sec. 332, 333; May. S. C. Prac., 552; it would seem to any party.

(d) If Carhart, but not Travelers' Insurance Company, is entitled to relief because of denial of due process of law, the insistence made above (B) (1) (c) is here repeated.

SAM'L C. WILLIAMS,
Solicitor.

JOHN H. BOWMAN,
Of Counsel.

SULLY *v.* AMERICAN NATIONAL BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 266. Argued April 26, 1900. — Decided May 28, 1900.

Bills were filed in Tennessee by the American National Bank and others against the Carnegie Land Company, a Virginia corporation, doing business in Tennessee under the provisions of the act which was under review in *Blake* v. *McClung*, 172 U. S. 239; 176 U. S. 59; and also against various creditors of that company. The prayer of the bill was that it might be taken as a general creditors' bill; and it was alleged that the company was insolvent, having a large amount of property in the State which it had assigned for the benefit of its creditors, without preferences, which was in disregard of the statute of the State, that a receiver should be appointed, the assets marshaled and the creditors paid according to law. The company answered denying that it was insolvent, and claimed that the assignment should be held valid, and the trust administered by the assignees. During the pendency of the suit, Sully and Carhart, New York creditors, filed a bill, setting up that nearly all the assets, if not all of them, in the hands of the assignee of the company, and sought to be impounded by the bill filed by the bank, were covered and conveyed to Sully, as trustee, and that Carhart was entitled to priority over all other creditors of the defendant in the appropriation of the assets covered by the deed of trust to Sully. They asked for leave to file that bill as a general bill against the land company, or, if that could not be done, that they might file it in the case of the bank against the land company, as a petition in the nature of a cross-bill against that company. Other proceedings took place which are set forth in detail in the statement of the case. They ended in the consolidation of the various proceedings into one action and a reference to a master to take proof of all the facts. The master made his report, upon which a final decree was entered. It was decreed that the land company, by its

Syllabus.

deed of general assignment, of June 3, 1893, in making disposition therein for the payment of its creditors, without any preferences, attempted to defeat the preferences given by law to creditors, residents of Tennessee, over non-resident creditors and mortgagees, whose mortgages were made subsequent to the creation of the debts due resident creditors, and that such deed was fraudulent in law, and void; that the making of the deed was an act of insolvency by the land company, and that the bill filed by the bank was properly filed, and should be sustained as a general creditors' bill, and that the assets of the company under the jurisdiction of the court were subject to distribution under the law relating to foreign corporations doing business in Tennessee, and as such should be decreed in the action then pending. The decree further adjudged that Carhart was a *bona fide* holder of the bonds mentioned in his bill, and that he was entitled to recover thereon as provided for in the decree, but subject to the payment of debts due residents of Tennessee prior to the registration of such mortgage. It was also decreed that the Travelers' Insurance Company by its mortgage acquired a valid lien upon the property covered by it, subordinate, however, to debts due residents of Tennessee contracted prior to the registration thereof, and also subject to some other liabilities of the land company. The case was taken to the Court of Chancery Appeals, which modified in some particulars the decree of the chancellor, and after such modification it was affirmed. Upon writ of error from the Supreme Court the case was there heard, and that court held that the statute in question, providing for the distribution of assets of foreign corporations doing business in that State, was constitutional, and was not in contravention of any provision of the constitution of the United States. The decree of the Court of Appeals was, after modifying it in some respects, affirmed. The case was then brought here on writ of error. *Held:*

(1) That on an appeal from a state court the plaintiff in error in this court must show that he himself raised the question in the state court which he argues here, and it will not aid him to show that some one else has raised it in the state court, while he failed to do so; but if he raised it in the Supreme Court of the State, it is sufficient;

(2) That the allegation in Carhart's case that he was a resident of New York is a sufficient allegation of citizenship, no question having been made on that point in the courts below;

(3) That a Tennessee general creditor has the same right of preference as against a resident mortgagee that he has against a non-resident, and the same burden that is placed upon non-resident mortgagees and judgment creditors is by the statute placed upon resident mortgagees and judgment creditors;

(4) That there is no foundation for the claim made, on behalf of Carhart, that section 5 of the Tennessee act of 1877 violates section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the non-resident mortgagee of his property

Statement of the Case.

without due process of law; but, on the contrary, the question has been decided the other way in *Blake* v. *McClung*;

(5) That there has been no denial by the State of Tennessee of the equal protection of the laws to any person within its jurisdiction.

THE contest in this case arises out of the insolvency of the Carnegie Land Company, a Virginia corporation, doing business at the time of its insolvency in the State of Tennessee under the provisions of the act of the legislature of that State passed in 1877, and which was under review in this court in *Blake* v. *McClung*, 172 U. S. 239; 176 U. S. 59.

The contest is between creditors of the company above named, who are non-residents of the State of Tennessee, both those who are unsecured as well as those who are secured by mortgages upon the property of the company in that State, and creditors of such company who are residents of the State.

The questions to be decided arise out of the provisions of the fifth section of the above mentioned act, the material portion of which reads as follows:

"SEC. 5. That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition." Acts of Tennessee, 1877, March 21, c. 31, p. 44.

On November 27, 1893, the American National Bank and

others filed their bill against the Carnegie Land Company and various named creditors of that company, and prayed that the bill might be taken as a general creditors' bill against the company on behalf of the complainants and of all the other creditors of the company, and that those named as creditor defendants might represent the class, their number being too great to make them all parties to the bill. The complainants alleged that they were creditors of the land company; that the company was insolvent; that it had a large amount of property in the State; that it had assigned the same for the benefit of its creditors without giving preferences, which was in disregard of the statute of the State, (above referred to,) and asked that the creditors of the company should prove their claims in that suit; that a receiver should be appointed, the assets marshaled and the creditors paid according to law.

To this bill the land company made answer, denying its insolvency, or that it had ceased to do business, or had abandoned its franchises, and claimed that its assignment was good and valid, and that the trust should not be taken out of the hands of its assignee.

During the pendency of this suit Wilberforce Sully and A. B. Carhart, residents of the State of New York, filed a bill against the land company and certain corporations in the State of Connecticut, called the Travelers' Insurance Company and the Connecticut Trust & Safety Deposit Company. The complainants alleged that the Carnegie Land Company had duly determined to issue three hundred thousand dollars worth of bonds, secured by mortgage upon its property in the State of Tennessee, and of that amount of bonds but eighty-five thousand dollars had actually been issued; that Sully was the mortgagee in trust in the mortgage executed by the company for securing the payment of the bonds, and that Carhart was the *bona fide* holder of all of the eighty-five thousand dollars of such bonds; that the mortgage was executed on January 2, 1893, and was duly registered in the office of the register of Washington County, Tennessee, on February 10, 1893; that the interest had not been paid as it became due, and that by virtue of a provision of the mortgage the whole principal sum had become due and

payable, and that the land company was in default in the payment of the principal and interest due on such bonds. The bill alleged the commencement of the suit already spoken of, brought by the American National Bank and others against the land company, and it alleged that nearly all of the assets, if not all of them, in the hands of the assignee of the company, and sought to be impounded by the bill filed by the American National Bank, were covered and conveyed to the complainant Sully, as trustee, and that the complainant Carhart, the holder of the outstanding bonds, was entitled to priority over all other creditors of the defendant in the appropriation of the assets covered by the deed of trust executed to Sully, as above stated. Complainants prayed that they might be allowed to file this bill as a general bill against the land company, or if for any reason this could not be done, that they should be allowed to file the same in the above cause of the bank against the land company and others as a petition in the nature of a cross-bill against the said company.

To this bill the complainants in the first bill, the American National Bank and others, made answer, and denied that the land company had ever executed any mortgage or that any bonds were ever issued under any mortgage, and denied that the land company ever in any way or manner, either in law or in fact, authorized the issuing of any bonds under such mortgage, or to be secured thereby, and they denied that any such bonds constituted any binding obligation as against the land company.

The bank also alleged that if the bonds to the extent of eighty-five thousand dollars had in fact been issued, yet still the debts sued on by the bank and its co-plaintiffs in the first bill above mentioned were contracted by the land company, and were incurred long before the execution and registration of the mortgage securing such bonds, and therefore they claimed that the debts owing to citizens and residents of Tennessee prior to the execution and registration of the mortgage, above mentioned, should have priority under the law over any debts secured or pretended to be secured by the mortgage.

The Travelers' Insurance Company and the Connecticut Trust

& Safety Deposit Company also filed an answer to the bill of Sully and Carhart, in which the Travelers' company alleged that the land company was indebted to it in the sum of $30,000, and three years' interest, and in other sums amounting to several thousand dollars, which amount was secured by a mortgage or deed of trust to the Connecticut Trust and Safety Deposit Company on what is known as the Carnegie Hotel property, which is a portion of the property of the land company, and is situated in the State of Tennessee. It also denied the existence of the bonded indebtedness claimed on the part of complainants, and alleged that in any event the debt of the Travelers' company against the land company was older than, and the mortgage to the Trust Company was prior to, that of the complainants Sully and Carhart, and it denied that these last-named parties had any debt as claimed by them or a lien of any kind on the property of the land company.

The insurance company also filed a petition in the suit brought by the bank, in which it set up the existence of its mortgage, and also prayed to be allowed to become a party to that cause, and to have its note, which was secured by the mortgage, declared a preferred claim, and decreed to be paid in full out of the proceeds of the sale of the property specifically mortgaged to it.

An amended petition was filed by it, in which it alleged that it was the owner of another claim against the land company in favor of P. Fleming & Company, for a little less than two thousand dollars, under the circumstances mentioned in the petition.

October 11, 1895, Mary P. Myton and A. B. Carhart filed a petition in each of the above suits, in which they described themselves as Mary P. Myton, a resident of the State of New York, and A. B. Carhart, a resident of the city of Brooklyn. In that petition Mary P. Myton alleged a claim against the land company, as existing on November 27, 1894, in the sum of $4094.54, with interest from November 27, 1892; while A. B. Carhart alleged a claim as of the date of November 27, 1894, of $2248.66, and they asked to become parties to the above named causes,

Counsel for Plaintiff in Error.

for the purpose of setting up these demands, and for a decree against the company for their amounts, with interest.

(It is stated that the two debts represented by these notes were actually in existence prior to the execution of the mortgage to secure the bonds owned by Carhart; the notes being, in truth, renewals of other ones executed prior to that time.)

These various proceedings were consolidated into one action, and the case was referred to a master to take proof of all the facts. The master made his report, upon which a final decree by the chancellor was entered. It was decreed that the land company, by its deed of general assignment, of June 3, 1893, in making disposition therein for the payment of its creditors, without any preferences, attempted to defeat the preferences given by law to creditors, residents of Tennessee, over non-resident creditors and mortgagees, whose mortgages were made subsequent to the creation of the debts due resident creditors, and that such deed was fraudulent in law, and void; that the making of the deed was an act of insolvency by the land company, and that the bill filed by the bank was properly filed, and should be sustained as a general creditors' bill, and that the assets of the company under the jurisdiction of the court were subject to distribution under the law relating to foreign corporations doing business in Tennessee, and as such should be decreed in the action then pending.

The decree further adjudged that Carhart was a *bona fide* holder of the bonds mentioned in his bill, and that he was entitled to recover thereon as provided for in the decree, but subject to the payment of debts due residents of Tennessee prior to the registration of such mortgage. It was also decreed that the Travelers' Insurance Company by its mortgage acquired a valid lien upon the property covered by it, subordinate however to debts due residents of Tennessee contracted prior to the registration thereof, and also subject to some other liabilities of the land company.

The case was taken to the Court of Chancery Appeals, which modified in some particulars the decree of the chancellor, and after such modification it was affirmed. Upon writ of error from the Supreme Court the case was there heard, and that

court held that the statute in question, providing for the distribution of assets of foreign corporations doing business in that State, was constitutional, and was not in contravention of any provision of the Constitution of the United States. The decree of the Court of Chancery Appeals was modified in some respects, and after modification it was affirmed, and the cause remanded to the chancery court for execution.

The case has been brought here on writ of error in behalf of certain unsecured creditors, non-residents of Tennessee, and also in behalf of the Travelers' Insurance Company and of the holder of the bonds issued by the land company.

Mr. T. S. Webb and *Mr. R. E. L. Mountcastle* for plaintiffs in error. *Mr. Quincy Ward Boese* was on their brief.

Mr. S. C. Williams and *Mr. E. J. Baxter* for defendants in error. *Mr. John H. Bowman* was on *Mr. Williams'* brief.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court.

There are two classes of creditors before the court, both of whom insist upon the erroneous character of the decree of the Supreme Court of the State. They are (*a*) general unsecured and non-resident creditors, and (*b*) non-resident creditors, who are also mortgagees. The creditors suing out this writ of error are all non-residents of the State of Tennessee, and they claim to have been illegally discriminated against in the courts below by reason of the statute of Tennessee providing for preferences to Tennessee creditors.

In regard to the unsecured non-resident creditors, objection is first made that there is only one of them, A. B. Carhart, who can be heard upon the question of the validity of the act of 1877, because he is the only person who has raised the point in any of the state courts. It is also claimed that the question was raised too late even by Carhart himself, inasmuch as it is alleged to have been raised by him for the first time in the Supreme Court of the State.

In reply to the first objection, it is urged on the part of creditors, other than Carhart, that they are general creditors in like class with him, and that if he can raise the question they are entitled to participate with him in the benefits of a decision thereof in his favor, to the same extent as if they had each personally raised the same question in the state court.

Cases are cited by counsel for these creditors from the courts of Tennessee, in which they say it has been held that "a broad appeal by any one party from an entire chancery decree, where the matter is purely of equitable cognizance, carries up the whole case so as to allow relief to be granted to those who do not appeal;" and it is said that Carhart made a broad appeal.

In reply, counsel for defendants in error say that the rule in Tennessee is that an appeal by an antagonistic party, even though a broad one, will not avail his opponent. It is also argued that the other creditors cannot be heard under Carhart's appeal, because the interests of such other creditors are not joint or common with him, but they are simply interested in the same question, which has never been held sufficient.

However it may be in regard to the rights of parties on appeal in the state court, we think that in order to be heard in this court the question must have been raised in the state court by the individual who seeks to have it reviewed here. A plaintiff in error in this court must show that he has himself raised the question in the state court which he argues here, and it will not aid him to show that some one else has raised it in the state court, while he failed himself to do so.

The two plaintiffs in error here, Sully, as the assignee of Manning, and Mrs. Myton, failed to appeal from the decree of the chancellor, as well as from the decree of the Court of Chancery Appeals, nor did they except to the report of the master, nor to the decree affirming it, and their first mention of the point in their own behalf is after the decision of the state Supreme Court.

This is not a case where, by the reversal of a decree at the instance of those who particularly raised the question in the courts below, the whole decree is opened and nullified so as to necessarily let in all parties standing in the same position to

share in the benefits of the decision. The fund is to be distributed in this case according to the decision of the court; and of the parties to this suit, those only can avail themselves of the benefits of the decree who have properly raised the question and in whose favor the decree is rendered.

We must hold, therefore, that neither Sully, as assignee of Manning, nor Mrs. Myton is in a position to raise the question of the invalidity of the state statute.

In regard to the objection that even Carhart has raised the question too late we think it is without foundation. He raised it in the Supreme Court, and that court decided it against him, not on the ground that he had not raised it in the lower court, but on its merits, and for the reason that in the judgment of the Supreme Court the statute was a valid and constitutional exercise of the legislative powers of the State.

The further objection made to Carhart is that it does not appear that he is a citizen of another State than Tennessee, and hence cannot avail himself of the fact of such citizenship in order to claim that his rights as such citizen have been infringed within the meaning of section 2 of article IV of the Constitution, declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. We think the objection untenable.

In his original bill to foreclose the mortgage securing the eighty-five thousand dollars of bonds held by him, he described himself as a resident of the State of New York, and in the petition of Mrs. Myton and Mr. Carhart, filed October 11, 1895, in the two cases of the bank against the land company, and Sully, trustee, against the land company, Mrs. Myton is described as a resident of the State of New York, and A. B. Carhart is described as a resident of the city of Brooklyn. No question seems to have been made throughout the litigation as to the citizenship of those parties. The question does not seem to have arisen in any stage of the case up to the argument in this court. Although there may be some slight difference in the facts between this case and those which are stated in *Blake* v. *McClung*, *supra*, at page 246, we yet think that Carhart brings himself within the principle decided in that case, and that his citizen-

ship in the State of New York should be regarded as sufficiently proved.

Being entitled to raise the question, we must hold, in conformity to our decision in the *Blake case*, that Carhart, as an unsecured creditor and a citizen of New York, is entitled to share in the distribution of the assets of the Carnegie Land Company upon the same level as like creditors of the company residents of the State of Tennessee, and as the decree denies him that right, it must be reversed for that reason.

The next question arises out of the mortgage given as security for the payment of the bonds of the land company, of which Carhart held all that had been issued—$85,000.

Part of the fifth section of the act of 1877 provides—

"Nevertheless, creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments."

Under this provision of the section, creditors of the land company residing in Tennessee, whose debts accrued prior to the filing and registration of the Sully, trustee, mortgage were by the decree of the court below preferred in payment over the mortgagee. By reason of such preference Carhart did not receive what he would have received, but for the preference so given. He claims that this preference in favor of resident creditors, whose debts existed when his mortgage was registered, is an illegal discrimination against him as a non-resident mortgagee, because the statute, as he says, while directing such a discrimination against a non-resident mortgagee, does not permit it as against a resident mortgagee. Such a discrimination, if it existed, is invalid within the decision of *Blake* v. *McClung*, *supra*.

It is objected, however, on the part of the defendants in error, that this is a merely abstract or moot question, because

there are no resident mortgagees, and their rights have not, therefore, been determined. The objection is not well taken. Although there are no resident mortgagees in this case, yet the decree of the court below, following the statute, has postponed the payment of the mortgage, in favor of resident creditors whose debts accrued prior to the registration of that mortgage. If the statute does not permit such postponement against a resident mortgagee, then the postponement in the case of a non-resident mortgagee would be invalid. The postponement has in fact been made as against the non-resident mortgagee, and whether that postponement was legal and valid is no mere abstraction, because by reason thereof this non-resident mortgagee has actually suffered a loss in the payment of his mortgage. It is, therefore, entirely immaterial whether in this particular case there are or are not resident mortgagees. We are in this case necessarily brought to a decision of the question, whether the postponement was valid, and that depends upon the question, whether the act permits a similar postponement in the case of a resident mortgagee? If it does, it is conceded that the act is valid, so far as this particular question is concerned.

For us to hold that such postponement is not permitted in the case of a resident mortgagee is to condemn the statute on that point as a violation of the Constitution of the United States. Such a construction should not be adopted if the statute is reasonably susceptible of another which renders it valid. That rule applies, even though on some other point the statute has been already held to be a violation of the Federal Constitution.

We think the true construction of the statute requires us to hold that the resident owner of a mortgage would be postponed in its payment in favor of those debts made or owing by the corporation prior to the filing and registration of his mortgage. In other words, that the Tennessee general creditor has the same right of preference as against a resident mortgagee that he has against a non-resident, and the same burden that is placed upon non-resident mortgagees and judgment creditors is by the statute placed upon resident mortgagees and judgment

creditors. We do not think that this construction leads to any absurd result.

It is urged that if it were to be so construed, a Tennessee creditor who had no mortgage or judgment would share with all other unsecured Tennessee creditors in the assets of the insolvent company, but that if he, being such creditor, took a judgment or mortgage as a security for the payment of his debt, he would thereby lose his right to share with the other resident non-secured creditors, and the latter would have a preferred right of payment over him for all debts of the company existing at the time of the registration of the mortgage. The creditor, it is said, would thus lose his right as a general creditor, and he would obtain no lien by his mortgage or judgment as against those creditors of whom he was one before he took his mortgage.

We agree that a construction which leads to such a result would be absurd, but such a result does not follow from our construction of the statute. When the Tennessee creditor takes his mortgage or recovers his judgment to secure an existing indebtedness, a new debt is not thereby created, but he has simply received, or obtained, a security for its payment, and a preference as against all other creditors whose debts may accrue subsequently to the filing and registration of his mortgage or the recovery of his judgment. He gains no priority over existing creditors of his class by taking a mortgage or judgment. The debts existing at that time, including his own, are to be paid, and it is only against debts subsequently incurred that the mortgage, or the judgment, has a preferential lien. If the debt for which he took the mortgage existed prior to the execution thereof, the mortgagee did not, by taking his mortgage, lose his right to share with the other unsecured creditors, but he did not acquire the right to assert the lien of his mortgage in preference to and against those creditors whose debts existed at the time of its registration. His rights as a general creditor of the land company, existing prior to the registration of the mortgage, were not in any manner lost or affected by the mortgage. He cannot assert the lien of his mortgage against prior creditors, but he does not lose his own right as a prior creditor

by taking the mortgage. Although the act was evidently passed for the purpose of awarding certain preferences to Tennessee over foreign creditors, yet we see nothing in its general purpose which requires us to consider the act as making a distinction in favor of a Tennessee mortgagee as against a non-resident mortgagee.

While the effect of this construction deprives both classes of mortgagees, in case of insolvency of the mortgagor, of any benefit from their mortgages as against resident non-secured creditors, existing when the mortgages were registered, yet, at the same time, it permits such mortgagees to share in the distribution of assets with such unsecured creditors, provided their own debts existed prior to the taking of the mortgage, and did not spring into existence simultaneously with the mortgage.

The rights of Carhart as a secured creditor must be adjusted with reference to these views. If his secured debt, or any portion thereof, did, in fact, exist prior to his mortgage, he is entitled to share with other unsecured creditors, who are residents of the State of Tennessee.

Plaintiff in error Carhart also insists that section 5 of the act of 1877 violates section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the non-resident mortgagee of his property without due process of law.

We are unable to perceive any foundation for the claim, and we think the question has been already so decided in *Blake* v. *McClung*, which we have so frequently referred to. It was stated in that case, at page 260:

"It does not follow that, within the meaning of that amendment, (XIV,) the judgment below deprived the Virginia corporation of property without due process of law simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other States or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that State. It had notice of the proceedings in the state court, became a party to those

proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of article IV of the Constitution of the United States relating to the privileges and immunities of citizens in the several States, as its co-plaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the state court erred in its decree in reference to that corporation the latter cannot be said to have been thereby *deprived* of its property without due process of law within the meaning of the Constitution."

That language fits this case. The principle is not altered by the fact that in this case the creditor had a mortgage which was postponed, while in the case cited his debt was unsecured, but it was also postponed to the Tennessee creditor.

Nor can we see that there has been any denial by the State of Tennessee to any person within its jurisdiction of the equal protection of the laws. Upon this point also we refer to the same case of *Blake* v. *McClung*, where, at page 260, the question is decided.

These two last points would apply also to the mortgage of the Travelers' Insurance Company. That company being a corporation of the State of Connecticut could not raise the question of a denial of any privilege or immunity as such citizen, under the provision of section 2, article IV, of the Constitution. *Blake* v. *McClung*, *supra*. But the questions as to the deprivation of property without due process of law and of being denied the equal protection of the laws are raised by that corporation, and must be decided in a way similar to the case of Carhart.

With the exception of Carhart as a non-resident unsecured creditor, we do not see that the plaintiffs in error herein have any right to complain of the decree of the Supreme Court of Tennessee, but as such non-resident unsecured creditor he has the right to share in the distribution of the assets of the Carnegie Land Company upon the same level as like creditors of the company who are residents of the State of Tennessee, and as the decree below denies him that right, it must be reversed as to him for that reason, and the case remanded to the Supreme

Court of the State for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE BREWER and MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.